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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 78.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*
THE NEW AMSTERDAM GAS COMPANY,
Plaintiff in Error,

against

THE STATE BOARD OF TAX COMMISSIONERS,
Defendants in Error.

In Error to the Supreme Court of the State of New York.

POINTS FOR DEFENDANTS IN ERROR.

JULIUS M. MAYER,
Attorney General of the State of New York.

LOUIS MARSHALL,
Of Counsel.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Points for Defendants in Error.

This cause was instituted in the Supreme Court of the State of New York by the relator, who prayed that a writ of *certiorari* might be allowed directed to the defendants in error, for the purpose of reviewing an assessment to the amount of $2,672, 751.94 that being the valuation

placed on the special franchises belonging to the relator, such assessment having been made under the provisions of Chapter 712 of the Laws of 1899, which is known as the Special Franchise Tax Law (Rec., pp. 3-7).

The questions involved in this cause are substantially identical with those which have been considered in the points submitted herewith in the case of *The People of the State of New York, ex rel., The Brooklyn City Railroad Company v. The State Board of Tax Commissioners,* which is No. 79 on the present docket. It is therefore deemed advisable to avoid repetition, and in consequence, the argument presented in that case will be treated as having been repeated in the present case.

The differences between these two cases, which will be briefly adverted to, are indicated by the terms of the franchises of the relator, on which the assessment, which has been attacked in this proceeding, has been based.

The issues herein were referred to Hon. Robert Earl, and were tried in conjunction with those arising in the Brooklyn City Railroad Company case. Independent findings of fact and of law were made by the referee. They appear at Record (pages 190-195).

The opinions rendered in this cause by the referee, the Appellate Division of the Third Department of the Supreme Court and the Court of Appeals are identically the same as those which were delivered in the Brooklyn City Railroad Company case. They appear at Record pages 196-230; 245-268; 280-302.

The special franchises owned by the relator are set forth at Record pages 9-14; 171-176; 183-185, and are as follows:

(1) The relator was formed by the consolidation of the following companies: (Rec. pp. 176-179).

The Equitable Gas Light Company of New York.

The New York and East River Gas Company.

The New Amsterdam Gas Company.

This consolidation was effected on February 16, 1898, pursuant to the provisions of Section 61, subdivision 3, of the Transportation Corporations Law, which reads:

"3. Any two or more corporations organized under this article, or under any general or special law of the State, for the purpose of carrying on any business which a corporation organized under this article may carry on, may consolidate such corporations into a single corporation by complying with the provisions of the Business Corporations Law relating to the consolidation of business corporations."

The provisions of the Business Corporations Law to which reference is thus made, are to be found in Sections 8-12, and are substantially the same as those of Chapter 367 of the Laws of 1884, which are considered in the *Consolidated Gas Company Case*, No. 79 on the present docket.

The effect of this statute is to create a new corporation, and in the present case it is expressly provided, in the agreement for consolidation, that "the name of the *new corporation* to be formed by the consolidation of said corporations shall be the same name as that of the corporation party of the third part hereto, viz, New Amsterdam Gas Company." (Rec. p. 177.)

Schurz v. *Cook, 148 U. S. 397, 410.*

Section 40 of the General Corporation Law, which was a re-enactment of section 8, title three, chapter eighteen, part one, of the New York Revised Statutes, provides:

"The charter of every corporation shall be subject to alteration, suspension and repeal in the discretion of the legislature."

(2) The several constituent corporations were organized as follows:

(*a*) The Equitable Gas Light Company of New York, by the filing of a certificate of incorporation, on March 10, 1882, under the provisions of Chapter 37 of the Laws of 1848, as amended. (Rec. pp. 171, 172.)

The provisions of this act, have been considered on page of the brief in the *Consolidated Gas Company case, No. 79,* and need not be here repeated.

(*b*) The permit given to the Equitable Gas Light Company of New York by the common council of the City of New York, for laying mains and pipes in the streets.

This permit was amended on various conditions: That the works should be so constructed as not to be in any way detrimental to the public health or to create a nuisance; that the gas furnished should be of the best quality of illuminating gas, and free from certain noxious compounds; that the gas should be supplied to the public lamps situated on the lines of the company's mains at a rate not to exceed certain maximum prices specified; that gas should be supplied to public buildings, markets, armories or corporation offices situated on the lines of the company's mains at rates not exceeding those speci-

fied; that gas should be supplied to the public at certain fixed rates; that the common council or the commissioner of public works should have the right to order extensions of mains involving an annual expenditure of not exceeding $20,000; that the mains should be laid so as not to interfere with the public sewers or sewer connections, or water mains or water connections; that a weekly report of all openings made in pavements should be rendered; that the permission granted should continue for a period of thirty years."

The fifteenth paragraph of the resolution provided:

"The said Equitable Gas Light Company its successor or successors shall pay into the city treasury the sum of twenty cents for every lineal foot of trench opened for mains, such sum to be paid monthly and to be accompanied by the certificate of the commissioner of public works; the sum paid is full payment at such rate for all trenches for mains opened during the month for which such payment is made."

(*c*) The New York and East River Gas Company was formed by the filing of a certificate of incorporation on December 26, 1893, under the provisions of "The Transportation Corporation Law," Chapter 566 of the Laws of 1890, as amended by Chapter 617 of the laws of 1892. (Rev. p. 173).

The provisions of this statute are substantially a re-enactment and codification of those of Chapter 37 of the Laws of 1848, to which reference has already been made.

(*d*) The East River Gas Company of Long Island City was formed by the filing of a certifi-

cate of incorporation, on May 2, 1890, under the provisions of Chapter 37 of the Laws of 1848. (Rec. pp. 184,185.)

This company is owned, controlled and operated by the relator. (Rec. p. 9.)

(*e*) Chapter 338 of the Laws of 1892, entitled "An Act to authorize the East River Gas Company of Long Island City to supply gas and electricity in the City of New York." (Rec. p. 14.)

Section 1 empowers the corporation to supply gas and electricity in the City of New York, and for that purpose it was authorized without further or other authority of law or ordinance, to lay and maintain requisite conductors, mains and pipes through and under any streets, avenues or public places of the city, and to lay and maintain such conductors, mains and pipes under and across the East River and across any intervening land belonging to the City of New York, or to private persons, at such places as it might determine.

It is further provided:

"Such corporation shall pay annually into the treasury of the City of New York to the credit of the sinking fund thereof, three per centum of its gross receipts from gas furnished by it to private and public buildings in the City of New York through mains laid by it as herein authorized under the streets or avenues of such city. Such payments shall be made on the first day of November in each and every year for and during the year ending on the next preceding 30th day of September."

(*f*) The New Amsterdam Gas Company was formed by filing its certificate of incorporation in October, 1897 (Rec., pp. 174-176), under the

provisions of the Transportation Corporation Law, which provisions have been sufficiently adverted to.

In none of these franchises is there any provision exempting the corporation from the payment of taxes. The payments required to be made by the Equitable Gas Light Company to the city treasury are for compensation to the city for the opening of the streets.

The compensation required from the East River Gas Company of Long Island City, of three percentum of its gross receipts, was likewise by way of compensation to the City of New York for the rights conferred upon the corporation to make use of the streets and avenues of the city.

There is no reference, even in the most remote degree, to the subject of taxation. Even if immunity from the obligation to bear the burden of taxation which should equitably rest upon all property within the State, had been expressly conferred on the relator, under the power reserved to alter, amend and repeal, in its charter, and in those of the companies of which it is composed, the right to impose a tax on such franchises existed unquestionably.

It is respectfully submitted that the judgment appealed from should be affirmed.

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State of New York.

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Points for Defendants in Error.

This cause was instituted in the Supreme Court of the State of New York by the relator, who prayed that a writ of certiorari might be allowed, directed to the defendants in error for the pur-

pose of reviewing an assessment amounting to $5,097,483.28, that being the valuation placed on the special franchise belonging to the relator, such assessment having been made under the provisions of Chapter 712 of the Laws of 1899, which is known as the Special Franchise Tax Law (Rec., pp. 2-9).

The writ of certiorari was granted on July 17, 1900, and in due time the defendants in error made return to the writ, showing that they had valued the relator's special franchises, for the year 1900, at the sum of $9,487,629, and annexed to their return the various reports made to them by the relator, a swell as the objections presented by the relator on the hearing before the defendants in error, afforded by the provisions of the act under which the assessment was made (Rec., pp. 10-32).

On the return of the writ, by consent of all parties, it was referred to Honorable Robert Earl, formerly a Judge of the Court of Appeals of the State of New York, to take and report to the Court, such evidence upon the several issues of fact raised by the petition, writ and return as might be adduced before him by either of the parties, with his findings of fact and conclusions of law (Rec., pp. 32-33).

Pursuant to this order, a protracted hearing took place before the Referee, who, in due time, rendered a report (Rec., pp. 535-544), in which specific findings are made, those material to the questions to be considered in this Court being the following:

Findings of the Referee.

I.—The relator was incorporated December 17,

1853, under a general law of the State of New York, known as Chapter 140 of the Laws of 1850, and then became and ever since has been a domestic street surface railroad corporation; and its principal office has been and still is located in the former city of Brooklyn, being the present Borough of Brooklyn in the City of New York.

II.—From and before 1850, and until January 1, 1897, the City of Brooklyn was a duly incorporated city of said State, and on January 1, 1898, became and since has been the Borough of Brooklyn, in the County of Kings, and a part of the City of New York, under and in pursuance to the Greater New York Charter .

III.—By resolution of the Common Council of the City of Brooklyn, duly adopted December 22, 1853, the consent of the Common Council of the City of Brooklyn, was duly given to the relator for the construction, maintenance and operation of a street surface railroad upon certain terms and conditions expressed in Exhibit 21c. (Rec., pp. 287-293), upon and through the streets of said city therein mentioned.

By Chapter 77 of the Laws of 1854, which forms a part of Exhibit 21c, the relator was authorized to construct and operate its railroad over the several routes mentioned in its articles of association and to continue the same from the termination thereof respectively into or through any town in the County of Kings, over, across or upon any road or highway therein, upon the terms and conditions in said act set forth.

IV.—Thereafter, and at various times between

December 17, 1853, and the year 1897, the relator, by consolidation, merger, purchase or otherwise, acquired and became the owner of the property, rights, privileges and franchises of certain other street surface railroad corporations, which are named.

V.—The special franchises of the Brooklyn City Railroad Company, as constituted and constructed on the second Monday of January, 1900, consisted of forty-five different franchises granted to thirteen different companies or individuals in the Boroughs of Brooklyn and Queens. The several streets, avenues, and public places on which said several special franchises have been so constructed are set forth and described on the maps marked Exhibits B 1 to B 10, inclusive. A portion of these, which are named, could not be operated profitably as separate and independent roads.

VII.—Certain of the special franchises now owned by the relator which were formerly owned by other corporations were, while so owned by such other corporations, encumbered by mortgages to secure the payment of the bonds of such other corporations then owning such franchises to the total principal amount of $925,000, which are still unpaid and outstanding. The special franchises of the relator are encumbered by mortgages to secure bonds issued by it of the total principal amount of $6,000,000, which are unpaid and outstanding. The value of the tangible property included in all the special franchises of the relator located in the Borough of Brooklyn on the second Monday of January, 1900, was $1,745,888. The value of the tangible property included in all the

special franchises of the relator located in the Borough of Queens on the second Monday of January, 1900, was $329,112.

VIII.—The charter of the City of Brooklyn was amended by an act of the Legislature of the State of New York, known as Chapter 564 of the Laws of 1880, which provided that the Common Council of said city should fix an annual license fee, not exceeding the sum of twenty dollars, for each street or horse car daily operated and used in said city, that every railroad company operating or using said cars should, on or before the first day of June in each year, certify to the city clerk the average number of cars daily operated and used by said company, and that every such railroad company should, on or before the first day of July in each year, pay to the treasurer of said city the license fee so established for the average number of cars so operated and used by said company; and that said license fees should be taken in full satisfaction for the use of the streets or avenues, but the same should not relieve said company from any obligations required by law to keep such streets or avenues, or any part thereof, in repair.

Thereafter, and on or about December 27, 1880, in pursuance of said act of the Legislature, the Common Council of the City of Brooklyn adopted an ordinance providing that licenses should be granted by the Mayor from time to time to owners of railroad cars, and that there should be charged and paid to the city treasurer for the use of the City on issuing such licenses by the parties to whom they should be granted for each railroad car, large or small, on horse, railroad or steam railroad, twenty dollars.

The said ordinance thereafter continued in force as an ordinance of the City of Brooklyn until the incorporation of the City of Brooklyn in the City of New York on January 1, 1898, and has since continued in force in the Borough of Brooklyn by virtue of the provisions of the Greater New York charter.

In pursuance of said act of the Legislature and of the said ordinance, the City of Brooklyn issued and delivered annually to the relator an instrument in writing, signed by the Mayor and attested by the clerk, under the corporate seal of said city, declaring that in pursuance of an ordinance of the Common Council the said city thereby licensed and appointed the Brooklyn City Railroad Company to run cars on the route known as the Brooklyn City route, in the streets of the City of Brooklyn under the provisions of the contract of said company with said City; said company obeying such rules and ordinances of the common council of said City as should from time to time be made for regulating the duties of such appointment. The relator, in pursuance of said acts of the Legislature and of the said ordinance, annually paid to the City Treasurer of the City of Brooklyn until January 1, 1898, and thereafter to the Chamberlain of the City of New York, twenty dollars per car for the average number of cars operated and used by the relator in the former City and present Borough of Brooklyn.

The provisions of the said act of the Legislature were re-enacted without substantial change by an act of the Legislature known as Chapter 583 of the Laws of 1888, being the revised charter of the City of Brooklyn, and substantially the same provisions were again re-enacted by an act of the

Legislature of the State known as the Greater New York charter, being Chapter 378 of the Laws of 1897, taking effect January 1, 1898, and were again re-enacted by an act of the Legislature of the State of New York known as the Revised Greater New York charter, being Chapter 466 of the Laws of 1901, taking effect January 1, 1902. Copies of said acts of the Legislature and of said ordinances and of the various proceedings in relation to said ordinance are set out in the evidence hereto annexed and marked "Exhibit 3 H" (pp. 224-237).

The Referee then finds that the relator filed with the State Board of Tax Commissioners all reports required by law or required to be filled by the Commissioners; that about March 20, 1900, the State Board of Tax Commissioners, claiming to act under and pursuant to Chapter 712 of the Laws of 1899, proceeded to fix and determine the valuation of the special franchises of the relator in the Borough of Brooklyn at the sum of $10,559,900, and in the Borough of Queens at the sum of $950,500, and thereupon made the assessments of said special franchises at these sums.

XI.—That immediately after making the assessment the said Board gave to the relator company a notice in writing, stating, in substance, that such assessments had been made, and that the total valuation of the relator's franchises in the Borough of Brooklyn was $10,559,900, and in the Borough of Queens was $950,500, and that the State Board would meet at its office in the City of Albany on the 10th day of April, 1900, at 10 o'clock A. M. to hear and determine any complaints concerning such assessments.

XII.—That the relator company, by its counsel, appeared pursuant to such notice, at the time and place therein stated, before the State Board and requested to be informed by the Board concerning and as to what was the amount which said Board had determined to be the valuation of the tangible property of the relator company, and as to what was the amount fixed and determined by the Board to be the valuation of the intangible franchise, rights and permissions of the relator company; and as to what was the method, rule or principle, if any, adopted and applied in ascertaining and determining the valuation; but the Board refused to give the relator company the whole or any part of the information so requested.

XIII.—That the relator company thereupon complained of the assessments, specifying the grounds of its complaint.

XIV.—That thereafter, and on or about the 30th day of April, 1900, the State Board of Tax Commissioners, still claiming to act pursuant to Chapter 712 of the Laws of 1899, finally determined the valuation of the special franchise of the relator company in the Borough of Brooklyn to be the sum of $7,608,184, and in the Borough of Queens to be the sum of $1,879,445, and on or about April 30, 1900, filed with the Department of Taxes and Assessments in the City of New York a written statement of such valuation as finally fixed and determined by the State Board and at or about the same time gave notice to the relator company that such written statement had been filed with the Department of Taxes and Assessments of the City of New York.

The report then proceeds to show that the Commissioners of Taxes and Assessments of the City of New York, about [illegible] made up the City the valuation of the special franchises of the relator as made by the defendants in error; that within fifteen days after the final completion and filing of the assessment roll, the relator applied for and obtained a writ of certiorari to review the assessment; that the State Board did not make separate valuation or assessment of each special franchise, or of each franchise, privilege or permission owned by the relator, but made one valuation or assessment of all the special franchises of the relator in the Borough of Brooklyn, and made one valuation and assessment of all the franchises of the relator in the Borough of Queens; that the special franchises owned by the relator in the Boroughs of Brooklyn and Queens did not in fact all adjoin each other and were not in fact all physically united, and did not in every instance furnish a continuous route of travel; that in making such assessment in each of the Boroughs the State Board fixed upon a certain figure as covering the value of the tangible and intangible property together, and did not separately review as a valuation of the tangible and intangible parts respectively; that the tangible property of the relator, the value of which was included in the assessment so made by the State Board, had for many years previous to such assessment been entirely assessed by the local assessors in the City of New York.

XXI.—That the defendants valued the property of the relator at what they deemed its full and fair value, taking into consideration the original report made by it to the Board, subsequent supple-

mental or special reports, the report of the State Railroad Commissioners, the records of the State Comptroller's office, the reports of the New York City Department of Assessments and Taxes, and after consideration of information from experts retained by the Board and of their confidential appraisers and special agents, and they also had before them the Poor's Manual and Financial Chronicle, and considered all of the elements, factors and considerations which they were enabled to gather from these sources. They based their valuation of the tangible property solely upon the cost of reproduction, with an allowance for depreciation.

Defendants considered among other things, in arriving at their valuation of relator's property, the fact that it had the right, acquired from other companies, to operate other lines of street surface railroad, and that it operated such other lines; that the franchises of the relator were more or less valuable by reason of the acquisition of such right; whether the relator had contracts with another company to run over its lines; the fact of its having control and operation of leased lines.

They had before them and considered a map showing the entire system of the Brooklyn Rapid Transit Company. They considered the market value of its stocks and bonds for what it might be worth and not as conclusive, or as an absolute measure of, valuation. They considered the earning power of the property of the company as reported to them by it. They considered the tax rate in Kings County, also net and gross earnings, the character of the motive power used, the amount of percentage tax or license fee paid to the city. They also considered the value of real

estate off the line of the road; the fact whether earnings were large or small, and assessed the special franchise at what the members of the Board agreed was the full and fair value thereof.

That in addition to these facts which were before the Commissioners previous to the hearing of relator, the Commissioners had upon, and after said hearing, before them and considered the statements, evidence, affidavits and arguments upon such hearing for the purpose of arriving at their final conclusion as to the valuation of the special franchises of relator.

That in assessing the special franchise of the relator, and in arriving at the valuation thereof, the defendants did not include in such assessment the valuation of any property except such as is in, above, upon, under or running through the public streets and public places of said city, including the franchises, rights, authority or permission to construct, operate and maintain its foundation, roadbed, substructure, superstructure, with their appliances in, upon, above, under or through said streets and public places. They did not include in such assessment or valuation the value of the right to be, or the franchise to be a corporation. They did not include the value of the good will of the business carried on by such corporation, nor did they include the value of any property other than that above stated and described as having been included by them. That such assessment as made of such special franchise of the relator includes the value of the tangible and intangible property in the streets of the City of New York, and was arrived at upon consideration of all the facts and circumstances affecting the value of such property, including the use or right to use

such streets and public places which the defendants were able to ascertain.

XXII.—The actual and true value of all the special franchises of the relator in the Borough of Brooklyn as finally determined by the defendants, and as I find, is $7,608,184.

The actual and true value of all the special franchises of the relator in the Borough of Queens as finally determined by the defendants, and as I find, is $1,879,445.

The Referee then finds that inasmuch as other real estate in the City of New York was assessed at only 67 per cent. of its actual value, in order to equalize the assessments of the relator with the assessments of other real estate a deduction should be made from the the assessment made by the defendants in error so as to reduce it on the special franchises of the relator in the Borough of Brooklyn to the sum of $5,097,483.28, and in the Borough of Queens to the sum of $1,259,228.15.

XXIV.—That the following is a correct statement of the assessed value of real estate in the State and in the City of New York, respectively, for the years hereinafter stated:

Total assessed real estate in State for 1899	$4,811,593,059
Total assessed real estate in State for 1900	5,093,025,771
Total assessed value of all special franchises in State for 1900	266,202,759
Total assessed value of tangible property for year 1899 included in the special franchises assessed in 1900 for whole State	96,061,902

TOTAL ASSESSED VALUE OF REAL ESTATE IN NEW YORK CITY, BY BOROUGHS, FOR 1899.

Manhattan and Bronx	$2,178,605,905
Kings	609,822,267
Queens	103,752,600
Richmond	40,264,692
	$2,932,445,464

TOTAL ASSESSED VALUE OF ALL REAL ESTATE IN THE CITY OF NEW YORK, EXCLUSIVE OF TANGIBLE PROPERTY INCLUDED IN THE SPECIAL FRANCHISE, BY BOROUGHS, FOR THE YEAR 1900.

Manhattan and Bronx	$2,369,997,504
Kings	651,383,900
Queens	104,427,872
Richmond	42,723,924
	$3,168,533,200

TOTAL ASSESSED VALUE OF ALL SPECIAL FRANCHISES IN THE CITY OF NEW YORK, BY BOROUGHS, FOR THE YEAR 1900.

Manhattan	$166,763,669
Bronx	7,272,249
Brooklyn	36,743,057
Queens	6,544,312
Richmond	2,356,064
	$219,679,351

TOTAL ASSESSED VALUE OF THE TANGIBLE PROPERTY FOR THE YEAR 1899 INCLUDED IN THE SPECIAL FRANCHISES ASSESSED IN 1900 FOR THE CITY OF NEW YORK BY BOROUGHS.

Bronx	$3,768,600

Brooklyn	18,048,775
Manhattan	50,428,750
Queens	2,935,600
Richmond	1,403,500
	$76,585,225

Upon these facts the Referee found, as conclusions of law:

I.—That Chapter 712 of the Laws of 1899 is a valid and constitutional enactment, practicable and operative, and that it gave authority to the defendants to assess the relator's special franchises for the purpose of assessment and taxation.

II.—That the relator had a hearing and had process of law before the defendants upon the review of their assessment on the tenth day of April, 1900, and was not there deprived of any of its legal or constitutional rights.

III.—That the assesments of the relator's special franchises should be confirmed after making the reductions specified in the findings of fact.

Proceedings Subsequent to Referee's Report.

The report of the Referee was then presented to the Supreme Court of the State of New York, at Special Term, where, after hearing the parties and the exceptions by them respectively to the report of the Referee, the report was confirmed, the findings of the Referee adopted, and a final order directed in accordance therewith (Rec., pp. 561-

572), and such final order having been entered (Rec., pp. 588-590), an appeal was taken by the relator to the Appellate Division of the Supreme Court, Third Department, where, by a divided Court (79 App. Div., 184), the order of the Special Term was reversed, on the sole ground that the assessment and tax complained of violated Section 2 of Article X of the Constitution of the State of New York, which reads as follows:

"All city, town and village officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of said cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct."

The contention of the relator, as supported by the Appellate Division, was, that this constitutional provision was violated by giving to the State Board of Tax Commissioners, instead of to the local assessors of the City of New York, the power to assess the franchises and tangible property in the streets of the City of New York owned by the relator.

The Attorney-General appealed from the order of the Appellate Division which vacated the relator's assessment, to the Court of Appeals, where the order of the Appellate Division was unanimously reversed and the judgment of the Special Term affirmed, and the assessments sought to be reviewed reinstated, the Court holding that Section 2 of Article X of the New York Constitution

was not violated, and that the act did not infringe any of the provisions of the Constitution of the United States.

The opinion rendered by Judge Earl was most elaborate, and it is believed that the comments made upon it by Judge Vann (*174 N. Y. 449*) will be found to have been well merited.

"In reviewing these cases we have received great aid from the strong and exhaustive opinion of the late Judge Earl, for many years a distinguished member of this Court, who, acting as referee, decided them in the first instance after full and careful consideration of all the questions involved. It was the last judicial work of that ripe lawyer and eminent jurist, and we can regard his decision as one of the most able and profound judgments ever pronounced by him during his long and useful career."

The opinion is divided into four parts: (1) That which deals with the State Constitution (Rec. pp. 590-603); (2) that which considers the questions arising under the Federal Constitution (Rec. pp. 603-612); (3)a discussion of the practicability of the act of 1899 (Rec. pp. 612-618); and (4) a consideration of the miscellaneous objections raised by the relator (Rec. pp. 619-623).

The opinions of the Judges of the Appellate Division are to be found at Record, pages 626-649, and in 79 *Appellate Division,* 184.

The opinion of the Court of Appeals is printed Record pages 651-674, and is reported in 174 *New York,* 417.

Assignments of Error.

After the remittitur from the Court of Appeals

had been filed in the Supreme Court of the State of New York, a petition for a writ of error was presented to and allowed by Mr. Justice Peckham (Rec. pp. 678, 679), and error is assigned on the ground that the State Court has declined to hold:

(1) That Chapter 712 of the Laws of 1899, in so far as it authorizes the assessment imposed by the State Board of Tax Commissioners upon the franchises of the relator, deprives it of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(2) That said legislative enactment, in so far as it authorizes the said assessment, denies to the relator the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(3) That said legislative enactment, in so far as it authorizes the said assessment, impairs the obligation of contracts, in contravention of Section 10 of Article I of the Constitution of the United States.

The statute which is thus attacked will be found printed in full in an appendix to this brief. (2 *New York Session Laws*, 1899, *pages* 1589-1596.)

History of the Act Creating the Tax.

Before proceeding to a discussion of the propositions raised by these assignments of error, it is deemed proper to call attention to the history of this legislation.

As is shown by the findings of the referee to which reference has been made, prior to the

adoption of the act of 1899, special franchises were not assessed. Tangible property, which constituted a part of the special franchises assessed in 1900, had been assessed in 1899 at $96,061,902. As a result of the act of 1899, special franchises, including such tangible property, were assessed at the sum of $266,202,759. Hence, property of the value of $170,000,000 had escaped taxation under prior legislation.

In a message addressed to the Legislature of the State of New York on March 27, 1899, Governor Roosevelt called attention to the injustice of the existing system, saying:

"The tax laws of this State are in an exceedingly unsatisfactory condition, and I do not see how they can be put on a just and wise basis save after careful investigation by legislative action. At present the farmers, the market gardeners, and the machinics and tradesmen having small holdings, are paying an improper and excessive portion of the general taxes, while at the same time many of the efforts to remedy this state of affairs, notably in the direction of taxing securities, are not only unwise but inefficient, and often serve merely to put a premium upon dishonesty. * * * There is evident injustice in the light taxation of corporations. I have not the slightest sympathy with the outcry against corporations as such, or against prosperous men of business. Most of the great material works by which the entire county benefits, have been due to the action of individual men, or of aggregates of men, who made money for themselves by doing that which was in the interest of the people as a whole.* * * But while I freely admit all this, it yet remains true that a corporation which derives its powers from the state should pay to the state its just percentage of its earnings as a return for the privileges which it enjoys. This should be especially true for the franchises bestowed upon gas companies, street railroads and the like. * * * I need not point out to you that in foreign com-

munities a very large percentage of the taxes comes from corporations which use the public domain for pipes, tracks and the like.* * * One thing is certain, that the franchises should in some form yield a monied return to the government" (Public Papers of Governor Roosevelt, 1899, pp. 54-57).

The Legislature thereupon passed an act, which sought to embody the ideas contained in this message, but provided that the assessments of the special franchises should be made by the local assessors in the various municipalities, and made no provision for the deduction of any moneys which were paid by the several owners of special franchises into the several municipal treasuries. The various corporations affected by the legislation complained seriously of these two features of the statute, insisted that the assessments should be made by the State Board of Tax Commissioners in order to insure fairness and equality, and that the deductions referred to should be allowed. Thereupon Governor Roosevelt issued a proclamation, convening the Legislature in extraordinary session, and on May 22, 1899, transmitted a second message on the subject, in which he said:

"I am perfectly well aware that as Chief Justice Marshall says: 'The power of taxation is the power of destruction.' But this applies to every species of property. If demagogues or ignorant enthusiasts who are misled by demagogues could succeed in destroying wealth, they would of course simply work the ruin of the entire community; and first of all, of the unfortunates for whom they profess to feel an especial interest. But the very existence of unreasoning hostility to wealth should make us all the more careful in seeing that wealth does nothing to justify such hostility. We are the true friends of the men of means, we are the true friends of

the lawful corporate interests which do good work for the community, when we insist that the man of means and the great corporation shall pay their full share of taxes and bear their full share of the public burdens. If this is done, then sooner or later will follow public recognition of the fact that it is done; and when there is no legitimate basis for discontent, the American public is sure sooner or later to cease to feel discontent.

"The Legislature passed, and there is now before me, a bill for the taxation of franchises by treating them as realty. After watching the progress of this bill I became convinced that the opposition to it was less to its particular features than to the general principle of taxing franchises in any way; in other words, I became convinced that any really effective measure of taxation aimed at franchises would be vigorously opposed. It, therefore, became of the utmost importance to secure this year some statutory enactment which would distinctly recognize the principle which we seek to establish. Toward the end of the session it became evident that the influences against the taxation of franchises would be content with nothing save the defeat of any measure of substantial relief; and a measure of less than substantial relief I would not accept. Finally, it became evident that the Legislature could pass only one bill and that without amendment. I therefore sent in a special message asking for the passage of this bill. It was passed on the last day of the session. It represents a long stride in the right direction, and one from which there must be no retrogression.

"Nevertheless, it can be greatly bettered if amended in two important particulars. In its essential principle, that of taxing franchises as realty, it is right and proper. After much study of the question, I am convinced that in this way we can come nearer to doing justice than in any other which has yet been proposed. It is no new thing to treat franchises as realty. They are so treated in Washburn's work on real property, and by Chancellor Kent; but under the laws of New York as they are now a franchise cannot be

taxed except by special statute, and as a matter of fact this extremely valuable species of property is in very many, if not in most cases, untaxed or taxed far below its value in comparison with other kinds of real estate. Local franchises are granted for various purposes and under varying conditions; sometimes by special statute and sometimes by the municipal authorities under a general statute. The value of the franchise, of course, varies widely in different localities, depending upon a variety of circumstances; but a great part of its value is dependent upon the same causes which operate to make other kinds of real estate more valuable in one locality than in another. The franchise is inseparable from the property of the corporation in the street, whether this property consists of poles, pipes or tracks, above the ground, under the ground or on the ground. The right to lay a railroad track and operate a railroad in a public street cannot be separated or dissociated from the railroad itself. This is equally true of the right to lay water and gas mains and the like. The franchise is a necessary and inevitable element of value and is a proper subject of consideration in determining the taxable value of the real property of the corporation enjoying it. The right to occupy a street should not be classed as an intangible something, distinct from the other property of the company, but should be treated as a necessary incident to the tangible property and one to be considered in measuring the value of the whole property. The Nichols law in Ohio, which provides for the taxation of certain kinds of corporations, such as telephone and telegraph companies and the like, doing business in the public streets, proceeds along these lines and has in practice been found to work admirably. It is possible that further experience may enable us to find some better method of taxing franchises, but with our present knowledge it is certainly wisest to tax them as realty. (Public Papers of Governor Roosevelt, 1899, pp. 54, 89, 102-110.)

Acting on this communication, the Legislature

enacted Chapter 712 of the Laws of 1900, amending the bill which was then in the hands of the Governor in conformity with his suggestions, which, as has already been said, were the result of the earnest requests of those affected by the legislation.

When, however, the State authorities came to enforce this legislation, they were met with the contention, that the very amendments which had been secured by the corporations ought to be removed made the act obnoxious to the Constitution of the State of New York, and it is now claimed in this Court, that the provision allowing deductions, originating as it did with the corporations, violates the "equality clause" of the Fourteenth Amendment to the Constitution of the United States.

The importance of this case can be measured by the fact that the several causes submitted herewith directly involve the validity of assessments to the amount of $23,250,000, and, indirectly, assessments aggregating $1,377,858,643, for the five years beginning with 1900; in other words the collectibility of annual revenues, amounting approximately to the aggregate sum of $275,000,000 is dependent on the outcome of this case.

POINT II.

I.

Of the numerous questions considered in the State Courts all are eliminated save those arising under the Federal Constitution, which were expressly raised in those Courts as shown by the Record.

(1) The decision of the Court of Appeals of New York, which sustains the act under review, is conclusive in this Court as to any question of conflict between it and the State Constitution.

Merchants Bank v. Pennsylvania, 167 U. S., 461.
West River Bridge Co. v. Dix, 6 How., 507.
Spencer v. Merchant, 125 U. S., 345.
Backus v. Cheshire R. R. Co., 125 U. S., 550, 560.
Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S., 232.
Lewis v. Monroe, 135 U. S., 546.
Adams Express Co. v. Ohio, 165 U. S., 194.
Long Island Water Supply Co. v. Brooklyn, 166 U. S., 685.
Dodge v. Board of Education, 302 U. S., 74.

In *Re Ayers*, 123 U. S., 507, Chief Justice Fuller said:

"The courts of the United States have always recognized the importance of leaving the power of the State to suitors to involve unrequired

Where the questions involved arise under the State Constitution and laws, the decisions of its highest tribunal are accepted as controlling. Where the Constitution and laws of the United States are drawn in question, the courts of the United States must determine the controversies for themselves."

In *Lewis v. Monson* (*supra*), Mr. Justice Brewer said:

"No question is more clearly a matter of local law than one arising under the tax laws. * * * The determination of any questions affecting them is a matter primarily belonging to the courts of the State, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded."

(2) It follows from these authorities, that this Court will not interfere with the construction given by the State Courts to the laws regulating the taxation of property within the State, or review findings of fact or the conclusions of assessing officers as to the value of property sought to be assessed. In other words, decisions based on local laws not involving a Federal constitutional question, or resting on pure questions of fact, are not reviewable.

Hibben v. Smith, 191 *U. S.*, 310.
Seneca Nation v. Christie, 162 *U. S.*, 283.
Tripp v. Santa Rosa Co., 144 *U. S.*, 126.
Iowa Central Ry. Co. v. Iowa, 160 *U. S.*, 389.
Lewis v. Campau, 3 *Wall.*, 106.
Dower v. Richards, 151 *U. S.*, 659.

In *Leffingwell v. Warren*, 2 *Black*, 599, this Court said:

"The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

In *Bucher v. Cheshire R. R. Co.* (*supra*), Mr. Justice Miller said:

"It has been held by this Court that the decisions by the highest court of a State in regard to the validity or meaning of the Constitution of that State, or its statutes, are to be considered as the law of that State, within the requirement of this section. (*U. S. R. S.*, § 721.)"

In *Kelly v. Pittsburgh*, 104 *U. S.*, 78, in which the validity of an assessment was sought to be drawn into question, Mr. Justice Miller said:

"It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject, that it is only necessary to refer to those decisions without a restatement of the argument on which they rest. State Railroad Tax Cases, 92 U. S., 575; Kennard *v.* Louisiana, 92 *id.*, 480; Davidson *v.* New Orleans, 96 *id.*, 97; Kirtland *v.* Hotchkiss, 100 *id.*, 491; Missouri *v.* Lewis, 101 *id.*, 22; National Bank *v.* Kimball, 103 *id.*, 732."

See also *Missouri, Kansas &c. R. R. v. Haber*, 169 *U. S.*, 613, 639, and *Smiley v. Kansas*, 196 *U. S.*, 447.

Hence, so far as this Court is concerned, all of the questions considered in the several opinions of Judge Earl, other than that dealing with the objections based on the Federal Constitution, may

be dismissed from further consideration; the law must be deemed valid under the State Constitution, its provisions of practical application, the valuation of the relator's property as based on sufficient and competent evidence and on a proper legal theory, and in strict accordance with the requirements of the State statute.

The sole questions which remain to be considered are, whether the act itself impairs the obligation of a contract, deprives the relator of its property without due process of law, or withholds from it the equal protection of the laws.

These criticisms will now be considered in the order stated.

II.

The act under which the relator was assessed for its special franchises does not impair the obligation of any contract within the meaning of Section 10 of Article I of the Federal Constitution.

(*a*) *The general scope of the act.*

Briefly considered, this act, which is entitled "An Act to amend the Tax Law in relation to the taxation of public franchises as real property", adds to the definition of the words and terms "land", "real estate" and "real property" as used in the prior act, by including therein "all surface, underground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain or operate the same

in, under, above, on or through, streets, highways, or public places; * * * all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity, or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes; * * * A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a 'special franchise'. A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise."

It is unimportant at this time to refer to any of the remaining provisions, other than Section 46, which makes the generous but unnecessary provision requiring a deduction to be made from a tax assessed on any special franchise, of any amount paid to any city, town or village in which the tangible property used in connection with the special franchise is located, if "it shall appear that the person, copartnership, association or corporation affected has paid to such city, town or village for its exclusive use within the next preceding year, under any agreement therefor, or under any stat-

ute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money, on account of such special franchise, granted to or possessed by such person, copartnership, association, or corporation, which payment was in the nature of a tax."

We concede, that before the enactment of this statute, special franchises had never been lawfully assessed, either by local or State authority within the State of New York, but were made taxable property by this act for the first time in the history of the State. That fact, however, far from being a reason for further immunity from taxation, is a conclusive reason for bringing this species of property within the broad power of taxing every class of property, which is inherent in the sovereignty of the State.

That a special franchise as defined in the act is property, subject to taxation, would scarcely require discussion, were it not for the apparent misconception of the character of such a franchise as indicated by the contentions of the plaintiff in error during the course of this litigation.

In *174 New York, 435*, Judge Vann undertakes to define such a franchise. He says:

"The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the State. The general franchise of a street railroad company, for instance, is the special instance conferred by the State on a certain number of persons known as the corporators to become a street railroad corporation and to construct and operate a street railroad upon certain conditions. Such a franchise, however, gives the corporation no right to do anything in the public highways without special authority from the State, or some municipal officer or body acting under its authority. When

a right of way over a public street is granted to such a corporation, with leave to construct and operate a street railroad thereon, the privilege is known as a special franchise, or the right to do something in the public highway, which, except for the grant, would be a trespass."

(*b*) *The general nature of the franchises taxed.*

These special franchises have all of the attributes of property. They are vendible and transferable. They cannot be taken away, even under the power of eminent domain, without due compensation. They may be leased or mortgaged. They survive the existence of the corporation upon which they are bestowed. They are the life and soul of the tangible property to which they appertain. They bestow an earning capacity upon physical properties, which, without them, would corrode and decay, and be utterly useless. While the tangible property employed for the utilization of the intangible franchise is destructible; the latter is indestructible. While the former requires renewal and reparation, the latter does not; and yet, the two are inseparable, and together constitute a species of property the aggregate of which in the United States, is valued in the exchanges of the country at figures which almost paralyze the imagination.

In the monumental opinion of Chief Judge Ruger in *People vs. O'Brien*, 111 *N. Y.*, 1, the character of a special franchise was elaborately considered, and since the rendition of that decision, its conclusions have been adopted throughout the country. Among other things he said (p. 40):

"We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway through its grant

from the city, under the authority of the Constitution and the act of the legislature. It is also well settled by authority in this State that such a right constitutes property within the usual and common signification of that word. When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country; the numerous laws adopted in the several States providing for their security and enjoyment, and the extent of litigation conducted in the various courts, State and Federal, in which they have been upheld and enforced, there is no question but that in the view of legislatures, courts and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term.

"It is, however, earnestly contended for the State that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the State. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this State have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally."

At page 47 he said:

"We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge and similar companies, and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading and insurance powers and similar privileges. The franchises last referred to being personal in character and de-

pendent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made. In the former class it has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise, so as to destroy or impair the value of such franchise (Gue *vs.* Tide Water Canal Co., 24 How. U. S., 257), and by parity of reasoning it must follow that the tracks of a railroad company and the franchise of maintaining and operating its road in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance."

This case was cited with approval in *Detroit vs. Detroit Citizens R. R. Co.*, 184 *U. S.*, 398.

In *Syracuse Water Company vs. City of Syracuse*, 116 *N. Y.*, 167, 182, Judge Bradley said:

"The inquiry which presents more important considerations has relation to the franchise granted to the plaintiff, and represented by its charter. By it the plaintiff was given corporate existence and vested with powers and privileges to enable it to exercise its functions. This incorporeaal hereditament was its property, and whatever other or corporeal property it had or acquired, having relation to its legitimate powers, and for the purposes of their exercise, became, and while applicable to such purpose was, inseparably united with the franchise. The corporate rights and the corporeal means of their exercise, therefore, constitute, as it were, a single body consisting of property corporeal and incorporeal. Both the power and the means of exercising it are essentially united, and upon such union is dependent the enjoyment as well as the practical value of the franchise.

To the same effect are the decisions in

People ex rel Woodhaven Gas Light Co., vs. Deehan, 153 *N. Y.*, 528.
Ingersoll vs. Nassau Electric Ry. Co., 157 *N. Y.*, 453, 463.
Ghee vs. Northern Union Gas Co., 158 *N. Y.*, 510, 513.

This Court has been equally emphatic in its declaration that these special franchises are property.

In *Wilmington Railroad vs. Reid,* 13 *Wall.*, 264, the Court said:

"Property is a word of large import, and in its application to this company included all the real and personal estate required by it for the successful prosecution of its business. * * * Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property, and of the most valuable kind. It cannot be taken for public use even without compensation."

In *Monongahela Navigation Co. vs. United States,* 148 *U. S.*, 312, 328, 329, a franchise for the taking of tolls on a canal was held to be property within the provisions of the Fifth Amendment to the Constitution, which entitled the owner to compensation in the same degree as for tangible property taken in a proceeding for the condemnation of a lock and dam belonging to such owner.

In *Adams Express Co. vs. Ohio,* 166 *U. S.*, 219, which, on an application for rehearing, affirmed the previous decision in 165 *U. S.*, 194, Mr. Justice Brewer said:

"Now, the taxes imposed upon express companies by the three States of Ohio, Indiana and

Kentucky are certainly not in terms 'privilege taxes.' They purport to be upon the property of the companies. * * * The burden of the contention of the express companies is that they have within the limits of the State certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property within the State; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them. But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consist in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from taxing at its real value such intangible property. * * * It is something of value, something on which he will receive cash, and which he can sell in the markets of the community for cash. It is as certainly property, and property of value, as if it were a building or a steamboat, and is as justly subject to taxation. It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."

The opinion then refers to *Henderson Bridge Co. vs. Kentucky,* 166 *U. S.*, 150, and the valuation that was placed upon the tangible property and franchises of that company, which was considerably greater than the value of its physical properties, and continues (p. 220):

"What gives this excess of value? Obviously the franchises, the privileges the company pos-

sesses—its intangible property. Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation. * * * Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation."

In *New Mexico v. United States Trust Co.*, 172 *U. S.*, 171, Mr. Justice McKenna, quoting from the opinion in *Joy* v. *St. Louis* 138 U. S., 1, said:

"The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. The right of way is of no particular use to a railroad without a superstructure and rails. The track is a necessary incident to the enjoyment of the right of way."

(*c*) *The State's power of taxation.*

It has become axiomatic since the principle was first announced in *McCulloch v. Maryland,* 4 *Wheat.*, 316, 429, that the authority of every State to tax all property, real and personal, within its jurisdiction, is unquestionable.

As was said by Mr. Justice Gray, in *Western Union Telegraph Co. v. Taggart,* 163 *U. S.*, 14:

"It is not and cannot be doubted that each State of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, provided the rights and powers of the National Government are not interfered with. Delaware Railroad Tax case, 18 Wall, 206, 232; Telegraph Co. *v.* Texas, 105 U. S., 460, 464;

Marye *v.* Baltimore & Ohio Railroad, 127 U. S., 117, 123, 124; Leloup *v.* Mobile, 127 U. S., 640, 649; Pullman's Co. *v.* Pennsylvania, 141 U. S., 18; Cleveland, &c., Railway *v.* Backus, 154 U. S., 439, 445."

"In *Atlantic & Pacific Telegraph Co. v. Philadelphia,* 190 *U. S.,* 160, 163, Mr. Justice Brewer said:

"The franchise of a corporation, although that franchise is the business of interstate comerce, is, as a part of its property, subject to State taxation, providing, 'at least, the franchise is not derived from the United States.'

"To the same effect is *Western Union Telegraph Co. v. Gottlieb,* 190 *U. S.,* 412."

The State may from time to time bring within the purview of its taxing power new subjects which had not been covered by previous legislation; as, for example, mortgages owned by citizens of other States on property within the State (*Savings & Loan Society v. Multnomah County,* 169 *U. S.,* 421); the right of succession to the property of one dying (*Magoun v. Illinois Trust & Savings Bank,* 170 *U. S.,* 283); debts owing by a resident debtor to a non-resident creditor (*Blackstone v. Miller,* 188 *U. S.,* 189); the right given to a foreign corporation to carry on business within the State (*Horn Silver Mining Co. v. New York,* 143 *U. S.,* 305); the amount of capital employed by a foreign corporation within the State (*New York* v. *Roberts,* 171 *U. S.,* 658).

Hence, if, as has been shown, the franchises of a public service corporation are property, they may likewise become the subject of taxation, especially when united with tangible property designed to utilize such franchises.

Henderson Bridge Co. v. Kentucky, 166 *U. S.,* 150.
State v. Anderson, 90 *Wisc.,* 550.
Detroit Citizens' Street Ry. Co. v. Common Council, 125 *Mich.,* 673.

In *State Railroad Tax Cases*, 92 *U. S.*, 575, *it* was held that the capital stock and franchises, as well as the real and personal property, of corporations, are justly liable to taxation, that all modes of taxation are more or less imperfect, and that it is within the power of the Legislature to ascertain the value of such franchises by determining the cash value of the funded debt and of the shares of the capital stock, and deducting therefrom the assessed value of all tangible real and personal property. In the course of his opinion Mr. Justice Miller said (p. 603):

"That the franchises, capital stock, business and profits of all corporations are liable to taxation in the place where they do business, and by the State which creates them, admits of no dispute at this day. 'Nothing can be more certain in legal decisions', says this Court in Society for Savings *v.* Coite, 6 Wall, 607, 'than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of a State government.' State Freight Tax case, 15 Wall, 232; State Tax on Gross Receipts, 15 Wall, 284."

In considering the criticisms directed to the method resorted to in that case for the assessment of the franchise, and the argument that the company, being insolvent and in the hands of a Receiver, its bonds in default and its capital stock of no value, the method employed was unjust, Mr. Justice Miller said:

"But the board of equalization assessed the capital stock and franchise at $2,003,415, and its tangible property at $2,629,367, thus assessing a property which pays but little, if anything, beyond its running expenses, at the sum of $4,632,782. This sounds plausible; but it is nothing more. Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of

the company has at present no market value, or is unsalable—there remains what is valued at worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling stock, and other tangible property? Is it supposed by anyone that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because, in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose. It is this franchise which the Legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debt, who shall say that it is not worth $2,000,000? And who shall say that such is not the real value now of this franchise?"

This case was cited with approval, and was applied in *Central Pacific Railroad* vs. *California*, 162 *U. S.*, 126.

The power to tax the relator's special franchises being thus unquestionable, it becomes important to consider whether the State of New York has debarred or precluded itself from imposing the tax created by the act under review, by any valid contract between it and the relator, or those in privity with it.

(*d*) *Principles of Interpretation of Alleged Contracts for Exemption from Taxation:*

The determination of this proposition will be facilitated by the consideration of three fundamental principles applicable to the subject of exemption from taxation, which will now be briefly stated.

(a) The power to tax being essential to the very existence of the State, there can be no presumption that it has been either abandoned or restricted, and whoever claims that it has been, must show that the intent to grant immunity was conferred in express and unambiguous terms, which will not be extended by implication beyond their fair import. Exemption from taxation will not be wrested from unwilling words.

Cooley on Taxation, 3rd *Ed.*, 112.
Providence Bank v. Billings, 4 *Peters*, 514.
Philadelphia R. R. Co. v. Maryland, 10 *How.*, 376.
Erie R. R. Co. v. Pennsylvania, 21 *Wall*, 497.
Farrington v. Tennessee, 95 *U. S.*, 686.

Memphis Gas Light Co. v. Shelby County Taxing District, 109 *U. S.*, 109.

New Orleans &c. R. Co. v. New Orleans, 143 *U. S.*, 192.

Stone v. Bank of Commerce, 174 *U. S.*, 412.

People v. Roper, 35 *N. Y.*, 629.

People v. Davenport, 91 *N. Y.*, 574.

In *Erie Railroad Company v. Pennsylvania* (*supra*), it was said:

"This Court has in the most emphatic terms and on every occasion, declared that the language in which the surrender of the right of taxation is made must be clear and unmistakable. The covenant or enactment must distinctly express that there shall be no other or further taxation. A State cannot strip herself of this most essential power by doubtful words. It cannot by ambiguous language be deprived of this highest attribute of sovereignty. The principle has been distinctly laid down in each of the cases referred to. It has never been departed from."

In *Wilmington & Weldon R. R. Co. v. Alsbrook*, 146 *U. S.*, 294, Mr. Chief Justice Fuller said:

"The taxing power is essential to the existence of government and cannot be held to have been relinquished in any instance unless the deliberate purpose of the State to that effect clearly appears. The surrender of a power so vital cannot be left to inference, or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitably in favor of the reservation of the power."

In *Ford v. Delta and Pine Land Co.*, 164 *U. S.*, 666, Mr. Justice Brewer said:

"It is abundantly established by the decisions of this as of other courts that exemptions from

taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter or the necessary scope of the exempting clause. Indeed there has been strong judicial dissent from the doctrine of the power of the state legislature to create a permanent exemption from taxation.

(b) In the absence of express statutory authority the State alone can grant exemption from taxation, and an attempt on the part of a municipality to confer such immunity would be *ultra vires* and ineffectual.

Minturn v. Larue, 23 *How.*, 435.
Syracuse Water Co. v. City of Syracuse, 116 *N. Y.*, 181.
Matter of Water Commissioners of White Plains, 176 *N. Y.*, 239.
Richmond County Gas Light Co. v. Middletown, 59 *N. Y.*, 228.
Norwich Gas Light Co. v. Norwich City Gas Light Co., 25 *Conn.*, 19.

In *Detroit Citizens' R. Co. v. Detroit R. Co.*, 171 *U. S.*, 48, Mr. Justice McKenna said, in language which is equally applicable, to an attempt on the part of a municipality to grant an exemption from taxation:

"It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated,

but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust, even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared—insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in Minturn *v.* Larue, 23 How., 435; Wright *v.* Nagle, 101 U. S., 791; State *v.* Cincinnati Gas Light and Coke Co., 18 Ohio St., 262; Parkhurst *v.* Salem, 32 Pac. Rep., 304; Saginaw Gas Light Co. *v.* Saginaw, 28 Fed. Rep. 529, decided by Mr. Justice Brown of this court; Long *v.* Duluth, 51 N. W. Rep., 913. See also Grand Rapids Electric Light and Power Co. *v.* Grand Rapids &c. Co., 33 Fed. Rep., 659, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule, see also Oregon Railway & Navigation Co. *v.* Oregonian Railway Co., 130 U. S., 1; Central Transportation Co. *v.* Pullman Palace Car Co., 139 U. S., 24."

(c) Even where the State undertakes to restrict its power of taxation, the rule applicable to the interpretation of public grants applies, namely, that the instrument by which restriction is claimed to have been created, must be so strictly construed as to operate as a surrender of the sovereign power no further than is expressly declared by the terms of the grant, the grantee taking nothing in that respect by inference.

Charles River Bridge Co. v. Warren Bridge, 11 *Peters*, 420.

Lehigh Water Co. v. Easton, 121 *U. S.*, 391.

Syracuse Water Co. v. City of Syracuse, 116 *N. Y.,* 167, 179.
Tennessee v. Whitworth, 117 *U. S.,* 148, 149.
Phoenix Ins. Co. v. Tennessee, 161 *U. S.,* 174.
Skaneateles Water Co. v. Skaneateles, 184 *U. S.,* 362.
Theological Seminary v. Illinois, 188 *U. S.,* 672.
Providence Bank v. Billings, 4 *Peters,* 514.
United States v. Arredondo, 6 *Peters,* 736.
Perrine v. Chesapeake & Delaware Canal Co., 9 *How.,* 192.
Richmond R. R. Co. v. Louisa R. R. Co., 13 *How.,* 71.
Pennock v. Coe, 23 *How.,* 117.
People v. Davenport, 91 *N. Y.,* 586.

In the last case Chief Judge Ruger illustrated the rule by a citation of appropriate cases:

"The Courts have therefore required an exemption from taxation to be described in clear and unambiguous language, and to appear to be, undisputably, within the intention of the legislature, or they have declined to enforce it. 'The taxing power is of vital importance', said Chief Justice Marshall in *Providence Bank* v. *Billings* (4 *Pet.,* 561); 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.' Illustrations of these rules are quite common in the books, and the following cases are among them: When an act exempted churches or places of public worship from 'being taxed by any law of the State', it was held that they were liable to an assessment for improving a street. (*In the Matter of the Mayor, etc., of New York,* 11 *John.,* 77.)

An act exempted cemetery associations from 'all public taxes and assessments.' Held, that they were liable to tax for building a sidewalk. (*Buffalo City Cemetery v. City of Buffalo*, 46 *N. Y.*, 506.) An exemption of every school house and every building erected for' a 'seminary of learning', was held not to exempt a private boarding school. (*Chegaray v. The Mayor, etc., of New York*. 13 *N. Y.*, 220.) Exemption from 'taxation of every kind' does not exempt from an assessment for street improvements. (*Sheehan* v. *Good Samaritan Hospital*, 50 *Mo.*, 155, 11 *Am. Rep.*, 412.) A railroad company paid the State a specific tax under the law which provided that it should not 'be assessed with any tax on its lands, buildings or equipments.' Held not to preclude municipal taxation. (*Orange & Alexandria R. R. Co. v. Alexandria*, 17 *Gratt.*, 176.) A statute laid a tax on railroads and declared it to be 'in lieu of all other taxes.' Held, not to exempt them from taxation for laying out a highway. (*Bridgeport v. N. Y. & N. H. R. R. Co.*, 36 *Conn.*, 255; 4 *Am. Rep.*, 63.) The Foster Home Society, by its charter, was exempt from 'taxes and assessments.' Held, that this did not include local assessments for municipal purposes. (*State Protestant Foster Home Society v. The Mayor, etc.*, 35 *N. J. Law*, 157)."

In *Tucker v. Ferguson*, 22 *Wall.*, 575, Mr. Justice Swayne said:

"The taxing power is vital to the functions of government. It helps to sustain the social compact and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession

clearly require. It is in derogation of public right, and narrows a trust created for the good of all."

In that case, a statute, after laying a specific annual tax of one per cent. on the cost of its road on a railroad company, and reserving a right to impose a further tax upon gross earnings, enacted that "the above several taxes shall be in lieu of all other taxes to be imposed within the State." It was held that the statute imposed a tax in reference to the railroad itself, and had no relation to lands owned by the company and not used nor necessary in working the road, and in the exercise of its franchise.

"In *Fertilizing Company v. Hyde Park*, 97 *U. S.*, 659, 666, Mr. Justice Swayne said:

"The rule of construction in this class of cases is, that it shall be most strongly against the corporation. Every reaonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court."

"See also 1 *Morawetz on Private Corporations, 2d Ed.*, § 323."

To these general rules of interpretation may be added a fourth rule applied by this court in ascertaining whether there exists a contract, within the meaning of the constitutional provision now under consideration.

It was thus expressed by Mr. Justice Shiras in *Wilson vs. Standefer*, 184 *U. S.*, 411, 412:

"It is settled law that this court, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, and whether its obligation has been impaired by the state enactment. Jefferson Bank *v.* Skelly, 1 Black, 436; New Orleans Waterworks *v.* Louisiana Sugar Company, 125 U. S., 18; Mobile & Ohio Railroad *v.* Tennessee, 153 U. S., 486; Chicago Railroad Company *v.* Nebraska, 170 U. S., 57; McCullough *v.* Virginia, 172 U. S., 102.

"But as the general rule is that the interpretation put on a state constitution or laws by the Supreme Court of such State is binding upon this court, and as our right to review and revise decisions of the state courts in cases where the question is of an impairment by legislation of contract rights, is an exception, perhaps the sole exception, to the rule, it will be the duty of this court, even in such a case, to follow the decision of the state court when the question is one of doubt and uncertainty. *Especial respect should be had to such decisions when the dispute arises out of general laws of a State, regulating its exercise of the taxing power,* or relating to the State's disposition of its public lands. In such cases it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of the laws, and knowledge of such particulars will most likely be found in the tribunals whose special function is to expound and interpret the state enactments."

(*e*) *The Relator's Franchises.*

Applying these rules to the present case, it will be difficult to spell any contract exempting the relator from taxation from any words contained in its charter, or in any of the ordinances passed by the Common Council of the City of Brooklyn, even assuming that the municipality had the right to confer such exemption, which is emphatically disputed.

The original ordinance (Exhibit 21c, Rec., p. 287), consisted of a resolution, wherein it was declared that the Common Council deemed it necessary and proper for the interests of the City that grants for a city railroad should be made on the following conditions, to wit: That horse power shall be alone used for the propelling of the cars; that the improved flat grooved rail shall be laid down even with the pavements of the various streets and avenues, so as not to interfere with the passage of vehicles; that the pavement be kept in repair within the tracks and three feet on each side of said tracks; that whenever an application shall be made to this Common Council for permission to lay a railroad track in any street or avenue in the city and it shall be decided by the Common Council to make such grant, notice shall be given of the intention of the Common Council to receive estimates, and license shall be granted on such terms and conditions as shall be deemed most conducive to public interest, and that each applicant receiving his license should be required to give such security for the faithful performance of the conditions of such license as the Common Council might direct.

Thereafter, a special committee of the Common Council prepared plans and regulations with respect to the laying of tracks in various streets, and received bids for the construction of street railroads on various routes specified from a number of bidders, each agreeing to carry passengers on the route for which he was the lowest bidder for a specified fare, and to pay an annual fee to the City of a specific sum for each car operated.

The several bidders having united their interests, and having organized a corporation under the name of the Brooklyn City Railroad Company,

thereupon had conferred upon them the right to construct, maintain and operate a railroad over the routes specified, upon the following conditions:

"The rails to be used shall be the improved grooved iron rails, laid even with the surface of the pavement in such manner as shall not interfere with the passage of vehicles over the streets and suitable bridges at all the gutters so as to prevent the flow of water under the same; the rails to be laid on substantial sills of the best yellow pine timber, with the best chestnut cross ties of suitable dimensions.

"The pavement to be kept in thorough repair by said company within the tracks and three feet on each side thereof with the best water stone under the direction of such competent authority as the Common Council may designate.

"The cars to be of the most approved kind in style and finish, and of such sizes as shall be best adapted to the respective routes, to be propelled by horse power only; the horses to be provided with bells and the cars with signal lights. Such number of cars shall be run on each route as public convenience shall require, and be subject to such prudential regulations as the Common Council may from time to time adopt. No cars to be allowed to run on the Sabbath.

"The double track shall not occupy more than fourteen feet six inches in width.

"The rates of fare for each passenger and the license fee for each car, to be paid annually into the city treasury, shall be on the respective lines above mentioned:

"1. Furman Street route, fare not to exceed five cents, license fee $50. 2. Court Street route, fare not to exceed four cents, license fee $20. 3. Powers Street route, fare not to exceed five cents, license fee $20. 4. Flatbush Avenue route, fare not to exceed five cents, license fee $20. 5. Fulton Avenue route, fare not to exceed four cents, license fee $20. 6. Myrtle Avenue route, fare not to exceed four cents, license fee $20. 7. Sands Street route, fare not to exceed five cents, license

fee $10. 8. Front Street route, fare not to exceed five cents, license $10.

"The construction of said railroad to be commenced at the earliest practicable period, and completely finished on or before the first day of December, 1854, as far as practicable.

"If a double track shall not, in the judgment of the street committee of the city, be practicable on the Front Street route or any portion of it, then a single track shall be laid on it, or on such portion of it as will not admit of a double track, and a return single track be laid in such other streets as, in the judgment of the said street committee, will accommodate that portion of the city through which said Front Street route is located.

"The taking up of so much of the streets and avenues as shall be necessary to lay the rails of the said lines of railroad shall be subject to the supervision and direction of the said street committee.

"Where lines of railroad, as hereinbefore described, run over the same ground, the same track shall be used, and nothing herein contained shall be construed to permit more than a double track of fourteen feet six inches in width upon any street or avenue in said city.

"The said company shall enter into good and sufficient bonds in an amount not less than two hundred thousand dollars for the faithful performance of all the conditions and stipulations herein contained, and that the said roads shall be perfectly completed and conducted."

That these franchises were of questionable validity, was intimated by the N. Y. Court of Appeals in *Binninger vs. City of New York*, 177 *N. Y.*, 199.

Chapter 77 of the Laws of 1854 confirmed certain rights granted to the Brooklyn City Railroad Company by the Common Council of the City of Brooklyn.

(*f*) *The absence of provisions exempting the Franchise from taxation.*

This franchise will be read in vain for a provision which, to the slightest extent, exempts the relator from the payment of a tax on its property. A franchise is granted to the corporation upon condition that the corporation shall keep the pavement within its tracks and three feet on each side thereof, in thorough repair; that the rates of fare of each passenger and the license fee for each car to be used, shall be as stated in the ordinance, and that the corporation will complete and operate the railroad and give a bond to that end.

To torture this into an exemption from taxation would require not only the implication of a contract, but the creation of one, in the absence of any expression, however ambiguous, vague or indefinite. In fact, the subject of taxation is not dealt with at all.

Viewed most favorably for the relator, the ordinance creates a franchise to construct and operate a railroad in consideration of certain specific covenants, which are to be performed by the corporation. These involve the construction of the railroad, the maintenance of its track in repair, the charging of a certain rate of fare, and the payment of an annual license fee for each car.

That is the consideration of the grant moving from the grantee to the grantor, but these covenants have no relation to the subject of taxation. As to that, neither the municipality nor the State entered into any covenant, condition or agreement whatsoever.

As a result of the creation of this franchise, there came into existence a valuable item of property—the special franchise of the Brooklyn City

Railroad Company. As such property, it became one of the potential subjects of State taxation, and when the State, in the exercise of its policy, determined that it should become taxable, it was no more exempt from such taxation than was the tangible property of the corporation.

Though called a franchise, it was in the nature of an easement—an incorporeal hereditament and must not be confounded with the franchise to be a corporation, or to exercise corporate powers. It survived the existence of the corporation, and the cessation of its powers. It bore to the franchise to be a corporation,the same relation,that a water-right bears to a corporation engaged in the operation of a mill or in the transmission of electrical energy generated by the use of the water-right.

If instead of requiring the payment of an annual license fee for each car operated by the relator upon its railroad, the City of Brooklyn had required the payment of the gross sum of $100,000, or even $1,000,000, for the franchise conferred, the payment of that sum would have been treated merely as a consideration for the grant of the franchise, in the same sense that the payment of the purchase price of a piece of land owned by the City of Brooklyn and conveyed to the relator would have been. Or, if instead of requiring the payment of a gross sum, or of an annual license fee for each car operated, the City of Brooklyn had required the payment of an annual rental of a specific sum, or of a certain percentage of the gross receipts realized by the relator from operating the railroad, such rental or percentage of receipts would in like manner have been treated as a consideration for the grant.

In fact all of these several forms of compensa-

tion have been from time to time adopted in the City of New York, with respect to special franchises granted to public service corporations. The records in the various cases submitted herewith, will show that in some instances no money consideration whatsoever was required to be paid by the grantee of the franchise. In other cases the grantee was required to keep a certain portion of the streets which were used by it in repair. In still others, an annual license fee based on the number of cars operated. In still others, the payment of a gross sum was exacted. In yet others, pursuant to the provisions of the *Laws of 1884, Chapter 252, Section 81, Laws of 1886, Chapter 65, Laws of 1886, Chapter 642, Laws of 1890, Chapter 565, Section 95, and Laws of 1892, Chapter 676,* the payment of a certain percentage of the gross receipts was made obligatory. While in other cases, several or all of these requirements were imposed upon the grantee.

But in every instance it is evident that the payments made were not in lieu of taxation, or intended to afford immunity from the payment of a tax, but merely as a consideration for the grant of the special franchise. That it was never understood that the payment of such consideration operated as an exemption from the payment of taxes, is evidenced by the fact that the tangible property used in connection with the franchise had always been made the subject of taxation, and in the year 1899 was assessed at $96,061,902.

A quotation from the opinion of Judge Earl (Rec. p. 606) is deemed quite pertinent in this connection. He says:

"All the lands in this State are held in some

way under grants from the State. In most cases the grantees pay what at the time was considered an adequate and full consideration for the lands granted. It would be a narrow proposition to contend now that the lands thus granted—grants be-in law contracts—could not be taxed like the mass of other property. Suppose the State leased lands for a long term of years, or in perpetuity, for rent to be paid, or other considerations to be performed annually; will any one seriously contend that such lands could not be taxed without the impairment of the obligations of contracts? And yet there would be there, as here, a continuous contract on the one part not to annul or interfere with the lease, and on the other part to pay the stipulated rent. Lands thus granted or leased no more enter into the general mass of property and private ownership than these franchises granted to individuals or corporations."

In conferring these franchises the subject of taxation was not considered. The franchises were perpetual in duration. They were sought by the relator, not out of benevolence to the public, but for money making purposes. The City of Brooklyn cannot be presumed to have had any intention to barter away the right to tax the property which came into existence under its ordinance for State, county or municipal purposes, again assuming that the right to effectuate so extraordinary a result had been conferred upon it by the sovereignty of the State.

Not only is the ordinance of the City of Brooklyn silent on the subject of general taxation, but Chapter 77 of the Laws of 1854 is equally silent. Had the Legislature intended to relieve the relator from all taxation upon its franchises through all the circling rounds of future years, in perpetuity, the least that could have been expected

was that that purpose should have been declared, even if it were by one little word in the legislation enacted for the benefit of the relator. But that word is missing.

The franchises subsequently conferred on the relator, which became the most vital organism of the greatest street railway system in the world (Rec. p. 495), and for which the present lessee is paying in perpetuity to the relator an annual rental of $1,548,500 over and above all taxes, and which it will have to pay long after all the tangible property which is covered by the lease has crumbled into dust, are likewise silent on the subject of exemption.

(*g*) *The charter provisions of the City of Brooklyn.*

But the relator argues that the charter provisions of the City of Brooklyn, set forth in finding VIII. (*supra*), and the acts thereunder, amount to a contract of exemption from taxation. These provisions contain the following elements:

(*a*) The fixing of an annual license fee by the Common Council not exceeding $20 for each car daily operated and used in the City.

(*b*) A certificate by the railroad company using such cars on or before June first in each year, of the average number of cars daily operated.

(*c*) The payment by the railroad company to the treasurer of the city, of the license fee so established for the average number of cars in operation.

(*d*) A declaration "that said license fee should be taken in full satisfaction for the use of the streets or avenues, but the same should not re-

lieve said company from any obligations required by law to keep such streets or avenues, or any part thereof, in repair."

(*e*) The adoption of an ordinance by the City of Brooklyn on December 27, 1880, providing that the annual license fee for each car should be $20.

(*f*) The delivery to the relator annually of an instrument signed by the Mayor and attested by the clerk, under the corporate seal of the City of Brooklyn, declaring that in pursuance of the ordinance the City thereby licensed and appointed the relator to run cars on the route known as the Brooklyn City route in the streets of the City of Brooklyn under the provisions of the contract of said company with the City.

It appears on the very face of the statute that these license fees were merely a consideration paid to the City by the relator for the use of the streets or avenues. The license fees were to be taken "in full satisfaction for the use of the streets or avenues." They were not to relieve the company from any legal obligations to keep the streets in repair, which was another of the considerations moving from the relator to the City of Brooklyn at the time of the original grant.

To contort this provision into a contract by the State, that the franchise, whether previously or subsequently created, to maintain and operate a railroad in the streets of the City, should be deprived of its attribute of taxability, is doing violence to language which is clear and unmistakable. As well might it be argued that the payment of the license fees operates as an exemption from the obligation to pay a tax on the rails, ties, conduits and electrical appliances used by the relator in the streets and avenues of the City.

We might well rest our argument on the obvious conclusion resulting from these premises. Since there has been no contract between the relator and the State on the subject of immunity from taxation, an impairment of the obligation of a contract is out of the question.

(*h*) *The Authorities relied on, by the Relator:*

1. The plaintiff in error has hitherto relied on *Mayor &c. of New York v. Second Avenue Railroad Co.*, 32 *N. Y.*, 261, and *Mayor &c., of New York v. Third Avenue Railroad Company*, 33 *N. Y.*, 32.

In both these cases, after the City had granted a franchise permitting the construction of a railroad, it undertook to pass an ordinance requiring the railroad company to procure a license from the Mayor for each car which it operated, and to pay annually therefor a fee of $50. It was conceded that this ordinance was enacted for revenue purposes only, and not as an ordinance for police and internal government. It was not a tax imposed under the general law of the State, but a mere effort on the part of the City to impose the obligation of paying an additional consideration for the rights conferred on the grantee.

In *Mayor &c. of New York v. The Broadway & Seventh Ave. Railroad Co.*, 97 *N. Y.*, 275, these cases were distinguished and limited. Judge Miller saying:

"In the case of the Second Avenue Company the action was brought relying entirely upon the ordinance of the common council, and the objection urged to its enforcement was that the road

was constructed under an agreement with the City which reserved no right to impose license fees, and it was held that there was a contract, and that the ordinance was the imposition of an annual tax upon the company in derogation of its rights of property, and on that account was unlawful and void. * * * The decision of the Court in the Second Avenue case cannot, we think, be regarded as embracing any case except the one actually decided."

In *Mayor &c. of New York v. Twenty-third Street Railroad Co.*, 113 *N. Y.*, 311, an act of the Legislature, which required a street railroad company organized under a previous statute to pay into the treasury of the City of New York one per cent. of its gross receipts, instead of a license fee as before prescribed, was held to be unconstitutional.

This case was approved and followed by this Court in *Schurz vs. Cook*, 148 *U. S.*, 411.

If the cases first cited are to be treated as a declaration by the New York Court of Appeals, that a franchise once granted cannot be subsequently taxed under general laws on the theory that there is an implication of a contract granting exemption from taxation, then they must be deemed overruled by the decision of that Court in the present case. At all events they are not authority in this Court.

2. The cases of *New Orleans Gas Light Co. v. Louisiana Light Co.*, 115 *U. S.*, 650; *New Orleans Water Works Co. v. Rivers*, 115 *U. S.*, 674; *Louisville Gas Co. v. Citizens' Gas Light Co.*, 115 *U. S.*, 683; *City of Walla Walla v. Walla Walla Water Company*, 172 *U. S.*, 1; *City Railway Co. v. Citi-*

zens' Street Railway Co., 166 *U. S.*, 577, and *Los Angeles v. Los Angeles Water Co.*, 177 *U. S.*, 558, which are also relied upon by the plaintiff in error, have no application here. In all of them the municipalities had, under legislative authority, granted to the corporations franchises, exclusive in their nature, and subsequently undertook to destroy the exclusive character of the franchise by competing with the corporations which had been made the recipients of these franchises, or granting similar franchises to other corporations. There was an unquestionable attempt to impair or destroy the contracts which granted the franchises, and, therefore, the cases came directly within the terms of the constitutional guaranty against the impairment of the obligation of a contract.

3. It is further claimed, that by taxing a franchise which has been granted under the sanction of legislative authority, the State is attempting to tax its own executory contract, and it is asserted that this may not be done, and *Murray v. Charleston*, 96 *U. S.*, 432, is cited in support of this contention.

There, the City of Charleston had issued bonds, called stock, by the terms of which interest was payable at the rate of six per cent. per annum, quarterly. The plaintiff, who was a resident of Germany, was the holder of some of these bonds. The City adopted an ordinance, imposing a tax of two per cent. per annum on the principal of the bonds, for the purpose of meeting the expenses of its government, and directed that the tax assessed on such bonds should be retained by the city treasurer out of the interest thereon when it became due and payable, and pursuant to this ordinance the tax imposed on the plaintiff's bonds was de-

ducted from the interest which had accrued, and he sued to recover the full amount of the interest.

It was held, that this constituted an impairment of the obligation of a contract; that when a city borrows money and promises to repay it with interest, it cannot, by its own ordinance, under the guise of taxation relieve itself from performing to the letter, all that it has expressly promised to its creditor. Mr. Justice Strong said:

"The obligation undertaken, therefore, was both to pay the interest at the rate specified, and to pay it to the plaintiff. Such was the contract, and such was the whole contract. It contained no reservation or restriction of the duty described. But the city ordinances, if they have any force, change both the form and effect of the undertaking. * * * It has been strenuously argued on behalf of the defendant, that the State of South Carolina and the City Council of Charleston possessed the power of taxation when the contracts were made; that by the contracts the city did not surrender this power; that, therefore, the contracts were subject to its possible exercise, and that the city ordinances were only an exertion of it. * * * All this may be admitted, but it does not meet the case of the defendant. We do not question the existence of a State power to levy taxes as claimed, nor the subordination of contracts to it, so far as it is unrestrained by constitutional limitation. * * * A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a State legislature."

In *People, ex. rel., Manhattan Fire Insurance Co. v. Commissioners*, 76 *N. Y.*, 64, it was held that bonds issued by the City of New York, and held by a corporation liable to taxation in that

city, were not exempt from taxation. *Murray v. Charleston* (*supra*) was relied upon, but was distinguished, Chief Judge Church saying:

"Here these bonds are taxed the same as other like property. The contract with the city is in no manner interfered with. The city pays its principal and interest according to the terms of its obligations without deduction or abatement. No Court has ever yet held that a State may not impose a general tax upon such property in the hands of individuals or corporations. The opinion expressly disclaims any such idea. It says: 'A State may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched.' Here the bonds are taxed under a general description of property according to value, under a law applicable to the whole State, and the terms of the contract are not affected."

4. *Hartman* v. *Greenhow*, 102 *U. S.*, 672, involved practically the same state of facts as *Murray v. Charleston*. There, the Funding Act of the State of Virginia provided that the coupons attached to the bonds issued by the State in pursuance of the statute, should be receivable at and after maturity for all taxes, debts, demands due the State, and that this should be expressed on their face. After the issuance of the bonds the legislature passed another statute, declaring that thereafter it should not be lawful for the officer charged with the collection of taxes or other demands of the State to receive in payment thereof anything else than gold or silver coin, United States treasury notes, or notes of national banks

of the United States. Subsequently another act was passed, providing that from the interest payable out of the treasury on the state bonds, there should be retained a tax equal to fifty cents per one hundred dollars of their market value, and that it should be the duty of every officer of the State charged with the collection of taxes, to deduct from the matured coupons which might be tendered to him in payment of taxes or other dues to the State, such tax as was or might thereafter be imposed on the bonds. There was a manifest attempt to withhold from the creditor a part of the benefits and advantages secured to him by his contract.

In the present case, the franchises granted to the relator were in no manner cut down, limited, restricted, or modified. They passed into what, in *Murray v. Charleston* (*supra*), was referred to as thrown "into the common mass" of private property. As such they came within the taxing power.

5. *Gordon v. Appeal Tax Court*, 3 *How., U. S.*, 133, has also been much relied on. There, the Legislature of Maryland, in 1821, continued the charters of several banks to 1845, upon condition that they would make a road and pay a school tax. This would have exempted their franchises, but not their property, from taxation; but another clause in the law provided that upon any of the banks accepting or complying with the terms and conditions of the act, the faith of the State was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act. This was held to be a contract relating to something beyond the franchise, and to exempt the stockholders from any tax levied

upon them as individuals, according to the amount of their stock.

The franchise there involved was one which related to the creation of a corporation, and its right to exist, and to exercise banking privileges. The tax sought to be imposed was treated as an attempt to increase the price, received as the consideration for the powers granted, and for the right to be. It did not relate to, or affect any property granted or created. While here the tax imposed by the Act of 1899 does not seek to increase the consideration for the grant, but merely treats the thing granted—the incorporeal hereditament, the right of way, and the property rights which have sprung from and which are used in its enjoyment, exactly as all property within the boundaries of the state, and which is protected by its courts, its police and its militia, is treated.

Moreover in the *Gordon case* there was clearly an express exemption of the corporations from the burden of taxation. As was said in *Jefferson Bank vs. Skelly*, 1 *Black*, 436, 446, that case did no more than to declare that the charter of a bank, is not taxable "if a price has been paid for it, which the legislature has accepted, with a declaration that it is in lieu of all other taxes." Yet even as thus explained, that case has since been practically overruled, and can no longer be deemed authority.

It was carefully considered in *New Orleans Railway Co. v. New Orleans*, 143 *U. S.*, 195, an action was brought against the corporation to collect a license tax of $2,500 imposed by an ordinance of the city pursuant to a statute of Louisiana. The tax was based on the amount of the annual gross receipts. It was claimed by the corporation that this ordinance impaired the obligation of its con-

tract, and in support of this contention it was shown that the city sold to the railway company, for $630,000, the right of way and franchises for running certain lines of street railroad within the city until January 1, 1906, and the company agreed to construct this railroad, to keep the streets in repair, and to comply with the regulations as to style and running of cars, the motive power, and the rates of fare as therein provided, and to "annually pay into the city treasury upon the assessed value of said road and fixtures the annual tax levied upon real estate, the value of said road and fixtures to be assessed by the usual mode of assessment"; and the city bound itself not to grant during the period for which said franchises were sold, a right of way to any other railroad company upon the streets through which said right of way was sold, unless by mutual agreement between the city and the purchaser or purchasers of the franchises.

In support of the contention of the corporation, *Gordon vs. Appeal Tax Court* was cited. The tax was nevertheless sustained, Mr. Justice Gray saying:

"Exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words. Vicksburg, &c., R. R. *vs.* Dennis, 116 U. S., 665, and cases cited. Assuming, without deciding, that the City of New Orleans was authorized to exempt the New Orleans Railroad Company from taxation under general laws of the State, the contract between them affords no evidence of an intention to do so. The franchise to build and run a street railway was as much subject to taxation as any other property. In Gordon *vs.* Appeal Tax Court, 3 How., 133, upon which the plaintiff in error much

relied, the only point decided was that an act of the legislature continuing the charter of a bank, upon condition that the corporation should pay certain sums annually for public purposes, and declaring that, upon its accepting and complying with the provisions of the act, the faith of the State was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock; and so much of the opinion as might, taken by itself, seem to support this writ of error, has been often explained or disapproved. State Bank *vs.* Knoop, 16 How., 369, 381, 401, 402; People *vs.* Commissioners, 4 Wall., 244, 259; Jefferson Bank *vs.* Skelly, 1 Black., 436, 446; Farrington *vs.* Tennessee, 95 U. S., 679, 690, 694; Stone *vs.* Farmers' Loan & Trust Co., 116 U. S., 307, 328. The case at bar cannot be distinguished from that of Memphis Gas Light Co. *vs.* Shelby County, in which this Court upheld a license tax upon a corporation which had acquired by its charter the privilege of erecting gas works and making and selling gas for fifty years; and, speaking by Mr. Justice Miller said: 'The argument of counsel is that if no express contract against taxation can be found here it must be implied, because to permit the State to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege. But the answer is that the company took their charter subject to the same right of taxation in the State that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter. The Constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the States. That is left to the State Constitutions and State laws.' 109 U. S., 398, 400."

Gordon vs. Appeal Tax Court (*supra*) was further limited and restricted in *Shelby County vs. Union Bank*, 161 U. S., 149, 159.

It is at variance with *Delaware Railroad Tax Cases*, 18 *Wall.*, 206, where an act granting a railroad charter provided, that the company should annually pay into the State treasury a tax of one-quarter of one per cent, upon its captital stock. This was held not to create a contract on the part of the State, that no additional tax should be laid. Mr. Justice Field, after laying down the doctrine as announced in *Providence Bank vs. Billings*, and in various cases above cited, added:

"All public grants are strictly construed; nothing can be taken against the State by presumption, *or inference*. The established rule of construction in such cases is that the rights and privileges and immunities not *expressly* granted, are reserved. There is no safety to the public interests in any other rule. And with special force does the principle upon which the rule rests apply when the right, privilege, or immunity claimed calls for an abridgement of the powers of the government, or any restraint upon their exercise. The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this court has stated, the whole community is interested in retaining it undiminished and has a 'right to insist that its abandonment ought not to be presumed in the case in which the deliberate purpose of the State to abandon it does not appear.'

"If the point were not already adjudged it would admit of grave consideration, whether the legislature of a State can surrender this power (the taxing power), and make its action in this respect binding upon its successors any more than it can surrender its police power or its right of eminent domain. But the point being adjudged,

the surrender when claimed must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the State."

To the same effect is *Wells* v. *Savannah, 181 U. S., 539.*

(i) *The State's reserved power to amend, alter and repeal the relator's franchises.*

But assuming that a contract of exemption from general taxation can be implied from the language of the ordinance; that the city had the power to grant such exemption, and that it intended to do so; that there was a consideration for the contract, which is essential, but which nowhere appears (*Grand Lodge* v. *New Orleans, 166 U. S., 143*); nevertheless the right to tax the relator's special franchises was properly exercised under the power reserved to the Legislature by the Constitution and statutes of New York.

Section 1 of Article VIII of the New York Constitution declares:

"Corporations may be formed under general laws, but shall not be created by special act except in certain cases. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

In *1 N. Y. Revised Statutes, p. 600, Section 8,* defining the powers, privileges and liabilities of corporations, it was enacted that "the charter of every corporation that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal, in the discretion of the Legislature."

The *General Railroad Act* (*Laws of 1850, Ch. 140*), under which the relator was organized, provided that every corporation formed under its provisions, should be subject to the provisions of the Revised Statutes to which reference has just been made.

Chapter 252 of the Laws of 1884, under which many of the franchises involved in the cases submitted herewith were granted, likewise provided that "the Legislature may at any time alter, amend or repeal this act." (*Section 19.*)

Practically every statute conferring corporate privileges on the several relators in the cases now under review, and on which their special franchises are predicated, contains an express reservation of the power to amend, alter and repeal, couched in substantially the same phraseology.

In *Miller* v. *The State, 15 Wall, 478,* which arose under the Constitution and statutes of New York, it was held that where this provision was incorporated in a railroad charter, it qualified the grant, and that the subsequent exercise of the reservation is not an act within the prohibition of the Constitution, and that the reservation is equally valid and effective if it exists in the Constitution of the State, or in the prior general law.

In *Schurz vs. Cook,* 148 *U. S.,* 397, 410, which also arose under the corporation laws of New York, and involved the "reserved power" provisions of the Revised Statutes, and of the General Railroad Act, it was held that the legislature could lawfully impose upon a railroad corporation, organized under the laws of that state, increased burdens of taxation, even though previous legisla-

tures had created a contract between the state, and a corporation to whose franchises the relator in that case, and his associates had succeeded, with respect to such franchises.

Adirondack Railway Co. v. New York, 176 *U. S.*, 345, involved a similar proposition.

In *Tomlinson* v. *Jessup, 15 Wall., 454*, a similar reservation was held to justify subsequent legislation which repealed a provision in the charter of a railroad company, which exempted the corporation from taxation during the existence of its corporate life. Mr. Justice Field said:

"The power reserved to the State by the act of 1841 authorized any change in the contract as it originally existed or as subsequently modified, or its entire revocation. The original corporators and subsequent stockholders took their interests with knowledge of this power and the possibility of its exercise at any time within the discretion of the Legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interests should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation. There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. * * * Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made."

Effect was given to similar provisions in a case

arising under the Laws of Massachusetts, which was decided concurrently with the two cases just considered (*Holyoke Water Power Co. v. Lyman*, 15 *Wall.*, 500), and a similar decision had been previously rendered under a similar reservation contained in the New York Banking Law in *Sherman v. Smith*, 1 *Black*, 587.

In *Railroad Company v. Maine*, 96 *U. S.*, 499, an act passed by the Legislature of Maine in 1856 authorized two or more existing corporations to form a new corporation, and the latter, upon its formation, became subject to the provisions of the general law of 1831, which declared that any act of incorporation subsequently passed should at all times thereafter be liable to be amended, altered or repealed at the pleasure of the Legislature, in the same manner as if an express provision to that effect was therein contained, unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary. The act of 1856 contained no limitation upon the power of amendment, and it was therefore held that the existence of the corporation, and its franchises and immunities derived from the State, were kept under its control, and, in consequence, a tax upon the corporate franchises was sustained.

In *Louisville Water Company v. Clark*, 143 *U. S.*, 1, under a provision of the Revised Statutes of Kentucky passed in 1856, and made part of every subsequent statute, to the effect that when not otherwise expressly declared, all charters and grants of or to corporations, or amendments thereof, and all other statutes, should be subject to amendment or repeal at the will of the legislature, the immunity from taxation conferred upon a corporation by an act of the Legislature

of Kentucky passed in 1882, was withdrawn by the general revenue act of 1886, without thereby impairing the obligation of a contract.

To the same effect is *Covington* v. *Kentucky*, *173 U. S., 231*, arising under similar legislation, in which Mr. Justice Harlan said:

"We are of the opinion that the exemption from taxation embodied in that act did not tie the hands of the commonwealth of Kentucky so that it could not, by legislation, withdraw such exemption and subject the property in question to taxation. The act of 1886 was passed subject to the provision in the general statute of Kentucky (above referred to) that all statutes shall be subject to amendment or repeal at the will of the legislature unless a contrary intent be therein expressly declared. If that act in any sense constituted a contract between the city and the commonwealth, the reservation in an existing general statute of the right to amend or repeal it was itself a part of that contract. Griffin *v.* Kentucky Ins. Co. 3 Bush, 592. The city accepted the act of 1886 and acquired under it the property taxed subject to that reservation. There was in the act no 'plainly expressed' intent never to amend or to repeal it. It is true that the legislature said that the reservoirs, machinery, pipes, mains and appurtenances, with the land upon which they were situated, should be forever exempt from state, county and city taxes. But such a provision falls short of a plain expression by the legislature that at no time would it exercise the reserved power of amending or repealing the act under which the property was acquired. The utmost that can be said is that it may be inferred from the terms in which the exemption was declared that the legislature had no purpose at the time the act of 1886 was passed to withdraw the exemption from taxation; not that the power reserved could never be exerted, so far as taxation was concerned, if in

the judgment of the legislature the public interests required that to be done. The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of subsequent statutes based upon mere inference. Before a statute—particularly one relating to taxation—should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably, expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture."

In *Citizens' Savings Bank* v. *Owensboro, 173 U. S. 636,* it was held that the mere grant for a designated time of an immunity from taxation does not take it out of the rule subjecting such grants to the general law retaining the power to amend or repeal, unless the granting act contain an express provision to that effect. Mr. Justice White said:

"The assertion that wherever it is stated in a legislative grant or charter that it is to last for a given period of time, therefore such provision is a plain manifestation of the intention of the legislature that the grant or charter shall not be repealed or amended for the time for which it was declared that it should exist, is fallacious, since it overlooks the consideration that the limit of time fixed for the duration of the charter or grant, like every other provision therein, is qualified by the reserved power to alter, amend or repeal. * * * Indeed, reduced to its final analysis, the argument that because in a grant or charter a time is designated for its duration, it cannot, therefore, until the expiration of such time, be repealed, altered or amended, is equivalent to saying that the reserved power cannot be exercised in any case of contract. For, if every case of charter or grant where a time is fixed, either expressly or by necessary construction in the charter or grant,

is taken out of the reach of the reserved power, it would follow that only those charters or grants which were determinable at will would come under the control of the power reserved. But to say this simply amounts to declaring that the reserved power applies and can be enforced only in those cases where it would be entirely unnecessary or useless to do so."

This language is applicable, not only to the provisions of a statute which relate to time, but with equal force, to each and every provision of the charter which is affected or qualified by the reserved power.

Of like import are the following additional cases:

Railroad Company v. *Georgia*, *98 U. S. 359, 365.*

Hodge v. *Railroad Company*, *99 U. U. S. 348, 353.*

Sinking Fund Cases, *99 U. S. 700, 720.*

Greenwood v. *Freight Co.*, *105 U. S. 13, 21.*

Knowles v. *Greenwood Cemetery*, *107 U. S. 466, 476.*

Spring Valley Water Works Co. v. *Schottler*, *110 U. S. 347.*

Gibbs v. *Baltimore Gas Co.*, *130 U. S. 396, 400.*

Sioux City Street Ry. Co. v. *Sioux City*, *138 U. S. 98, 108.*

Hamilton Gas Light Co. v. *Hamilton City*, *146 U. S., 258, 270.*

Looker v. *Maynard*, *179 U. S. 46.*

Corry v. *Mayor, &c., of Baltimore*, *196 U. S. 466.*

Attention has already been called to the case of *Mayor &c. of New York* v. *Twenty-third Street Railway Co., 113 N. Y., 311,* which was approved in *Schurz* v. *Cook, 148 U. S., 411,* in which it was held that under this reserve power a tax upon the gross receipts of a railway company did not constitute an impairment of the obligation of the contract embodied in the charter of the corporation, which imposed a license fee of $50 for each car as a compensation to the city for the franchise which was conferred upon the railway company.

There is nothing in the decisions in the *City Railway Company v. Citizens' Railroad Company, 166 U. S., 557,* or in *Detroit v. Detroit Citizens' Street Railway Company, 184 U. S., 368,* in conflict with the views above expressed. In neither of these cases was there any attempt by the legislature, under its reserve power, to amend, alter or repeal the charters of the street railway companies, which were involved. In each of the cases the municipal authorities, after having entered into contracts with the railway companies in strict conformity with the powers delegated to them by the State legislature, undertook to violate the terms of the contract—in the first case by granting a franchise to another corporation, and in the second, by undertaking to change the rates of fare which were fixed by the terms of the contract.

In the first of these cases Mr. Justice Brown said (*166 U. S.*, at page *564*):

"Did the act of 1891, known as the new charter, repeal the act of 1861 authorizing the incorporation of railway companies? In other words, should it be construed as an exercise of the power, reserved to the State in the eleventh section of the act of 1861, to amend or repeal that act at

the discretion of the legislature? As the act of 1891 practically established a new system and vested the whole power of the legislature over street railway companies in the board of public works of the several cities therein named, subject to the approval of the common council of such cities, perhaps it might be construed to repeal the former, so far as there was a conflict between the two acts; but it certainly should not be construed to act restrospectively or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction. While it was doubtless intended to authorize the board of public works of the cities covered by the act to contract for the use of their streets by railway companies, there is nothing from which can be inferred a power to disturb or interfere with contracts already existing—indeed, it is highly improbable that it would ever have delegated such a power to a subordinate body."

In the second of these cases Mr. Justice Peckham said (*184 U. S., at pp. 396-7*):

"The further objection is made that under the power of alteration and repeal, provided for in the constitution of Michigan and under the terms of the various ordinances giving power to the common council in certain cases to provide for further rules and regulations, the right is reserved to the common council to alter the rates of fare provided for in the various ordinances under consideration, as it alone may regard reasonable and just, without the consent of the company.

"The constitution of the State of Michigan, article 15, section 1, provides: 'Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed.' Counsel for the defendants contends 'that the regulation of rates of fare or toll upon the street railway

is a governmental function, delegated by the legislature of the State of Michigan to the municipalities, and no matter in what form such delegation of power may be exercised, whether by ordinance or an assumed contract, it is nevertheless a law, subject to alteration, amendment or repeal. It has not been the policy of the State of Michigan since the adoption of the present constitution to permit irrevocable legislation. The State cannot do it itself, and if it cannot, surely one of its creatures, like a city, cannot be permitted to do that which its creator is prohibited from doing.'

"We have already seen that the legislature was competent to grant to the City of Detroit the right to give its consent to the laying of the tracks of a street railway and the operation of the same in and through its streets upon such terms and conditions as the parties might agree upon. The grant of this power was not the formation of a municipal corporation, directly or indirectly, either in substance or effect. The legislative act which granted the power to the city could not be altered, amended or repealed by the latter. No such power was given to it by the legislature and probably could not even be delegated in any event. It is sufficient to say that none was attempted. *City Railway Company v. Citizens Railway Company, 166 U. S., 557, 563.*

"The legislature has not attempted to interfere with the rights of the street railway companies in Detroit, and hence the extent of its power so to do is not involved in this case."

In *Cleveland v. Cleveland City Ry. Co., 194 U. S., 536,* no action of the legislature, in the exercise of its reserved power was involved. This clearly appears from the opinion of Mr. ustice White, who said:

"In reason, the conclusion that contracts were engendered, would seem to result from the fact that the provisions as to rates of fare were fixed

in the ordinance for a stated time, *and no reservation was made of a right to alter*, etc.

The decision in *New Jersey v. Yard*, 95 *U. S.*, 104, far from affecting the doctrine for which we contend, recognizes it. In that state there was no constitutional provision which reserved the right to alter, amend and repeal laws creating corporate privileges. There was a general statute to that effect, but differences having arisen between the State and a corporation as to the interpretation of a clause in the corporate charter relating to taxation, enacted subsequently to the general law, an act was passed for the purpose of adjusting the dispute, in which it was provided that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this state or any law thereof." Under the circumstances it was held that this act was not governed by the reserved power contained in previous acts. Mr. Justice Miller however said:

"The case before us differs from those in which, by the Constitution of some of the States, this right to alter, amend and repeal all laws creating corporate privileges becomes an inalienable legislative power. The power thus conferred cannot be limited or bargained away by any act of the Legislature, because the power itself is beyond legislative control. The right asserted in this case to amend or repeal legislative grants to corporations being itself but the expression of the will or purpose of the Legislature for one particular session or term of the State of New Jersey, cannot bind any succeeding legislature which may choose to make a grant or a contract not subject to be altered or repealed; or, if any, the succeeding Legislature to that of 1846, which enacted that 'the charter of every corporation which shall hereafter be granted by the Legislature shall be subject to

alteration, suspension, and repeal in the discretion of the Legislature,' shall grant a charter or amend a charter, declaring in the act that it shall not be subject to alteration and repeal, the former act is of no force in that case. So it can by a general law repeal this general reservation of the right to repeal, and all special reservations in separate charters. It follows that, *unlike the constitutional provision in other States*, it is in New Jersey a question, in every case of a contract made by the Legislature, whether that body intended that the right to change or repeal it should inhere to it, or whether like other contracts, it was perfect, and not within the power of the Legislature to impair its obligation."

III.

The objection that the act under consideration violates the "due process" clause of the Fourteenth Amendment of the Constitution, is without merit.

The statute contains most adequate provisions, insuring to every owner of a special franchise not only a full and fair hearing, before the State Board of Tax Commissioners, with respect to the assessment and valuation of the special franchise, but, in addition to such hearing, the Act affords to the owner of the special franchise the right to review the determination of the State Board of Tax Commissioners in the courts. In fact, the very proceeding which is now under consideration here is one instituted under the authority of the

Act which is sought to be condemned, for the purpose of reviewing the assessment made under the terms of the statute as against the relator.

Section 42 of the Tax Law requires the State Board of Tax Commissioners to annually fix and determine the valuation of each special franchise subject to assessment in each city, town, village or tax district.

Section 42 requires every person, copartnership, association or corporation subject to taxation on a special franchise, within thirty days after the time when the Act went into effect (October 1, 1899), to make a written report to the State Board of Tax Commissioners containing the information which is specified in the Act.

Section 44 provides that on making an assessment of a special franchise the State Board of Tax Commissioners shall immediately give notice in writing to the person, copartnership, association or corporation affected stating in substance that such assessment has been made, the total valuation of such special franchise, and the valuation thereof in each city, town, village or tax district; and that the board will meet at its office in the City of Albany on a day specified in such notice, which must not be less than twenty nor more than thirty days from the date of the notice, *to hear and determine any complaint concerning such assessment.* Such notice must be served at least ten days before the time fixed for the hearing. The manner of such service is described, and it is provided that section thirty-six of the Tax Law is to apply so far as practicable to the

hearing by the State Board of Tax Commissioners under section forty-four.

Section 36 of the Tax Law, to which reference is thus made, reads as follows:

"The assessors shall meet at the time and place specified in such notice, and hear and determine all complaints in relation to such assessments brought before them, and for that purpose they may adjourn from time to time. Such complainants shall file with the assessors a statement, under oath, specifying the respect in which the assessment complained of is incorrect, which verification must be made by the person assessed or whose property is assessed, or by some person authorized to make such statement, and who has knowledge of the facts stated therein. The assessors may adminster oaths, take testimony and hear proofs in regard to any such complaint and the assessment to which it relates. If not satisfied that such assessment is erroneous, they may require the person assessed, or his agent or representative, or any other person, to appear before them and be examined concerning such complaint, and to produce any papers relating to such assessment with respect to his property or his residence for the purpose of taxation. If any such person, or his agent or representative, shall willfully neglect or refuse to attend and be so examined, or to answer any material question put to him, such person shall not be entitled to any reduction of his assessments. Minutes of the examination of every person examined by the assessors upon the hearing of any such complaint shall be taken and filed in the office of the town or city clerk. The assessors shall, after said examination, fix the value of the property of the complainant and for that purpose may increase or diminish the assessment thereof."

Section 45 provides that an assessment of a

special franchise by the State Board of Tax Commissioners may be reviewed in the manner prescribed by Article XI of the Tax Law, and that such Article is to apply, as far as practicable, to

Article XI of the Tax Law contains minute provisions as to the procedure to be observed for a review of an assessment by one aggrieved, and by Section 255, which is included in the Article, it is provided that an appeal may be taken by either party from an order, judgment or determination under this Article as from an order, and shall be heard and determined in like manner as appeals in the Supreme Court from orders. The Code of Civil Procedure confers the further right of review in the Court of Appeals.

Acting under these several provisions, the State Board of Tax Commissioners required the relator to render the report called for by section 43, and the report was submitted in compliance with such requirement (Rec. p. 17 to 27). Notice was likewise given by the State Board of Tax Commissioners to the relator of a hearing afforded to it as to any complaint concerning the assessment made by the State Board of Tax Commissioners (Rec. p. 14, 27). On the day fixed for such hearing the relator appeared and filed its objection to the assessment as made (Rec. p. 27 to 31) and was given the fullest opportunity to show, if possible, that the assessment of its special franchises was incorrect. The relator's idea of the hearing, however, was that the State Board of Tax Commissioners were to submit to an inquisition and cross-examination with respect to the manner and theory and the evidence acted upon by those officials in arriving at the valuation which the relator had adopted.

From the determination of the State Board a writ of certiorari was then sued out by the relator to review the assessment and on the reference ordered by the Court voluminous testimony was presented. A hearing ensued before the referee, another before the Court at Special Term, a third in the Appellate Division of the Supreme Court, and a fourth in the Court of Appeals, and yet complaint is made that the plaintiff in error is being deprived of its property without due process of law.

This court is not concerned with the correctness of the valuation of the relator's special franchises, or of the soundness of the rules of evidence, or of the opinions adopted by the Tax Commissioners, the referee or the several State courts which sat in review of the assessment. When the parties to a controversy—and especially those whose property has been assessed for purposes of taxation—have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State court cannot be said to deprive the unsuccessful litigant of his property without due process of law.

Sauvinet v. *Walker,* 92 U. S., 90.
Head v. *Amoskeag Mfg. Co.,* 113 U. S. 9.
Arrowsmith v. *Harmoning,* 118 U. S. 356, 369.
Morley v. *L. S. & M. S. Ry* 146 U. S. 162.
Bergemann v. *Packer,* 157 U. S. 655.
Central Land Co. v. *Laidley,* 159 U. S. 103.

It would seem unnecessary, after this statement of the statutory provisions of the act whose constitutionality is challenged, to cite any of the numerous authorities of this court bearing on the subject. Our only excuse for doing so lies in the importance of the case and the high standing of the counsel who represent the plaintiff in error.

In *McMillan* v. *Anderson*, 95 U. S. 37, it was held that the revenue laws of the State may be in harmony with the Fourteenth Amendment, even though they do not provide that a person shall have an opportunity to be present when a tax is assessed against him; that a statute which gives a person against whom taxes are assessed a right to enjoin their collection, and have their validity judicially determned, is due process of law, even though he is required, as in other injunction cases, to give security in advance.

In *Hagar* v. *Reclamation District*, 111 U. S. 701, it was held that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe the "due process clause" is the owner has an opportunity to question the validity or amount of it, either before that amount is determined or in subsequent proceedings for its collection.

Mr. Justice Field said (p. 710):

"But where a tax is levied on property, not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, and in most of the states provision is made for the correction of errors committed by them through boards of re-

vision or equalization sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law.

"In some States, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts, and be there corrected, if erroneous, or set aside, if invalid; or objections to the validity or amount of the assessment may be taken when the demand is made to enforce it. In such cases, all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceeding due process of law. In *Davidson* v. *New Orleans* (96 U. S., 97), this court decited that precise point."

In *Palmer* v. *McMahon*, 133 U. S., 660, which involved the New York statutory system of taxation, Chief Justice Fuller, sustaining the tax, said:

"The power to tax belongs exclusively to the legislative branch of the government, and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is proper to the nature of the case, the assessment cannot be said to deprive the owner of his property without due process of law (Spencer *v.* Mills, 125 U. S., 345; Walston *v.* Nevin, 128 U. S., 578). The imposition of taxes is in its nature administrative and not judicial, but assessors exercise quasi-judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value. It is enough, however, if the law provides for a board

of revision authorized to hear complaints respecting the justice of the assessment and prescribes the time during which and the place where such complaints may be made. The law of New York gave opportunity for objection before the tax commissioners (Laws of New York, 1859, c. 302, §10, p. 681), and the plaintiff in error appeared and obtained a large deduction from the original valuation. If dissatisfied with the final action of the commissioners, he could have had that action reviewed on certiorari."

In *Pittsburg Ry.* v. *Backus*, 154 U. S., 421, which involved an assessment of railroad property under the laws of Indiana by the terms of which property of individuals and ordinary corporations were subject to valuation and assessment by county officers, while the assessment of railroad property was committed to the State Board of Tax Commissioners, it was held that there was no invasion of constitutional rights. Mr. Justice Brewer (after citing *State Railroad Tax Cases, 92 U. S., 575 and Kentucky Railroad Tax Cases, 115 U. S., 321*, which involved similar questions), adverting to the claim that there was a lack of due process with respect to the provision for a hearing permitted by the act said:

"A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment satisfies the demands of the Constitution in this respect."

In the *Kentucky Railroad Tax Cases, 115 U. S., 321*, it was held that a State statute for the assessment of taxes, which gave notice of the proposed

assessment to the owner by requiring him at a time named to present a statement of his property, with his estimate of its value, to a designated official charged with the duty of receiving the statement; which fixes time and place for public sessions of other officials, at which this statement and estimate were to be considered, where the official valuation is to be made, and when and where the party interested had a right to be present and to be heard, and it gave him opportunity to judicially contest the validity of the proceeding, was due process of law within the Fourteenth Amendment.

Of like import are the following cases:

Fallbrook District v. *Bradley,* 164 U. S., 112.
Merchants & Mfrs. Bank v. *Pennsylvania,* 167 U. S., 461.
Bauman v. *Ross,* 167 U. S., 590.
King v. *Mullins,* 171 U. S., 404.
Bellingham Bay v. *New Whatcom.,* 172 U. S., 314.
Turpin v. *Lemon,* 187 U. S., 51.
Glidden v. *Harrington,* 189 U. S., 255.
Hibben v. *Smith,* 191 U. S., 310.
Corry v. *Mayor of Baltimore,* 196 U. S., 466.

In the latest reported case on the subject, *Hodge* v. *Muscatine County, 196 U. S., 276,* it was held that after a taxpayer is given an opportunity to test the validity of a tax at any time before it is made final, either before a board having a quasi-judicial character or a tribunal provided by the

State for that purpose, due process is not denied.

The relator, however, has heretofore complained that it has been deprived of a hearing because the State Board of Tax Commissioners decline to comply with the requirements of the plaintiff in error; that they should state the theory on which the assessment of the special franchises had been made; in other words, because the tribunal which was to afford a hearing declined to be catechised the relator was deprived of due process of law. On that theory a litigant would be deprived of his Constitutional rights if the court should decline to be interrogated as to its mental operations or its views as to the questions of fact and of law involved in the process of reaching a legal conclusion. Such procedure is a most curious misconception of what constitutes a "hearing" in the Constitutional sense of the term. The relator, instead of presenting facts which would guide the State Board of Tax Commissioners in fixing a valuation on the special franchises to be assessed, stood mute on that subject, gave no testimony and presented no fact, but contented themselves with an effort to point out some flaw, if possible, in the ratiocination by means of which the State Board of Tax Commissioners had reached a tentative valuation of the relators' property. If such a procedure should receive judicial sanction, insuperable difficulties would be placed in the way of taxing officers and the collection of State revenues would become well-nigh impossible. That a judicial or quasi-judicial officer may not be subjected to such an extraordinary inquisition has been conclusively shown in *Fayerweather* v. *Ritch, 195 U. S., 276, 307.* Quot-

ing from *Packet Company* v. *Sickles, 5 Wall., 580,* Mr. Justice Brewer said.

"But it is proper to say that the secret deliberations of the jury, or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding. The jurors oftentimes, though they may concur in the result, differ as to the grounds or reasons upon which they arrive at it."

He then proceeds to say:

"Tested by the rule thus laid down the testimony of the trial judge, given six years after the case had been disposed of, in respect to the matters he considered and passed upon, was obviously incompetent. True, the reasoning of the court for the rule is not wholly applicable, for as the case was tried before a single judge there were not two or more minds coming by different processes to the same result. Nevertheless no testimony should be received except of open and tangible facts—matters which are susceptible of evidence on both sides. A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought never to be overthrown or limited by the oral testimony of a judge or jury of what he had in mind at the time of the decision."

In *Coulter* v. *Louisville & Nashville R. R. Co.,* 196 *U. S.,* 599, 610, the procedure of putting the members of the state board of valuation and assessment upon the witness stand "to testify to the operations of their minds in doing the work entrusted to them" was under the authority of *Fayerweather* vs. *Ritch* (*supra*), denounced as an "anomalous course."

IV.

Equally unfounded is the claim that this legislation deprives the relator of the equal protection of the laws.

It applies equally to all surface, underground or elevated railroads. It includes the value of all franchises, for the construction maintenance or operation of such railroads. It applies to all mains, pipes and tanks, including the value of all franchises to construct, maintain and operate.

It applies to every person, copartnership, association or corporation subject to taxation on a special franchise (§§ 43, 44). In other words, it treats with absolute equality every owner of that class of property which is denominated a special franchise. But it is claimed that special franchises are assessed by the State Board of Tax Commissioners while the property of other taxpayers is valued by local assessors, and that there is therefore a discrimination between the owners of one class of property and another.

In matters of taxation, however, it has been long since decided that such classification is not in contravention of the constitution. The question was elaborately considered in the *Kentucky Railroad Tax Cases, 115 U. S., 321, where* precisely the same differences existed between taxation of railroad property and other property as those which are pointed out in the present case. It is nevertheless held that a State law for the valuation of property and the assessment of taxes thereon, which provides for the classification of property subject to its provisions, into different classes; which makes for one class one set of pro-

visions as to modes and methods of ascertaining value and as to right of appeal, and different provisions for another class as to those subjects; but which provides for an impartial application, for the same modes and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, denies to no person affected by it "equal protection of the laws."

This case was followed in

Pittsburgh Ry. Co. v. Backus, 154 U. S., 421;
Pacific Express Co. v. Seibert, 142 U. S., 354;
Adams Ex. Co. v. Ohio, 165 U. S., 228;
Magoun v. Illinois Trust & Savings Bank, 170 U. S., 293.

In *Magoun v. Illinois Trust & Savings Bank* (*supra*), Mr. Justice McKenna, after referring to the Kentucky Railroad Tax Cases and to the general subject of equality of protection, said:

"The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. And in matters not of taxation, if A be a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B, *Missouri Pacific Railway v. Mackey*, 127 U. S., 205, to a different measure of

damages than B, *Minneapolis & St. Louis Railway v. Beckwith,* 129 U. S., 26, and it permits special legislation in all its varieties. *Missouri Pacific Railway v. Mackey,* 127 U. S., 205; *Minneapolis & St. Louis Railway v. Herrick,* 127 U. S., 210; *Duncan v. Missouri,* 152 U. S., 377.

"In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. * * *

"Of taxation, and the case at bar is of taxation, Mr. Justice Bradley said in the *Bell's Gap Railroad v. Pennslyvania,* 134 U. S., 232, and Mr. Chief Justice Fuller in *Giozza v. Tiernan,* 148 U. S., 657, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. The range of the State's power was expressed by Mr. Justice Bradley, as follows: 'It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State framing their constitution.'

"And so Mr. Justice Miller, speaking for the court in *Davidson v. New Orleans,* 96 U. S., 97, 105, said: The Federal Constitution imposes no restraints on the State in regard to unequal taxation."

In *Cook v. Marshall County, 196 U. S., 261,* it was held that a classification in a taxation statute in which a distinction is made between retail and

wholesale dealers, is not unreasonable, and that section 5007 of the Iowa Code, imposing a tax on cigarette dealers is not invalid as denying equal protection of the law to retail dealers because it does not apply to jobbers and wholesalers doing an interstate business with customers outside of the State. Kehrer v Stewart 197 U.S. 60

Mr. Justice Brown, after considering *Connolly v. Union Sewer Pipe Co., 184 U. S., 540,* and *Cotting v. Kansas City Stock Yards Company, 183 U. S., 79,* which were relied upon in support of the claim that the act was unconstitutional, said:

"These cases, however, have but limited application to laws imposing taxes, where the right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a spirit of prejudice or favoritism. Kentucky Railroad Tax Cases, 115 U. S., 321. This distinction was recognized by Mr. Justice Harlan in Connolly *v.* Union Sewer Pipe Company, on page 562, wherein it is said: 'A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States.' "

In *Coulter* v. *Louisville & Nashville R. R. Co.,* 196 *U. S.,* 608, Mr. Justice Holmes said:

"If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from the tangible property in the State, there can be no question that the State had power to tax it at a different rate, so far as the Constitution of the United States is concerned."

With respect to the taxation of franchises it had previously been declared by this Court in *California* v. *California & Pacific R. R. Co.*, 127 *U. S.*, 1:

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation, but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand, or ten hundred thousand dollars, as the legislature may choose, or without any value of the franchise at all, the tax may be arbitrarily laid."

V.

If there were even a doubt as to the constitutionality of the legislation now attacked, it should be determined in favor of the validity of such legislation, since it affects the revenues of a sovereign State and is designed to promote a just distribution of the burdens of taxation among its citizens.

The language of Mr. Justice Miller, *in King v. Mullins, 171 U. S., 436,* seems most appropriate:

"The judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State at-

tempts to do is in palpable violation of the constitutional rights of the owners of property."

VI.

It is respectfully submitted that the action of the Courts of the State of New York should be affirmed.

JULIUS M. MAYER,
Attorney General of the
State of New York.

LOUIS MARSHALL,
Of Counsel.

Appendix.

LAWS OF NEW YORK

Passed at the

EXTRAORDINARY SESSION OF THE LEGISLATURE, WHICH BEGAN MAY 22, 1899, AND ENDED MAY 25, 1899.

Chap. 712.

An Act to amend the tax law, in relation to the taxation of public franchises as real property.

Became a law May 26, 1899, with the approval of the Governor.

Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision three of section two of the tax law is hereby amended to read as follows:

3. The terms "land," "real estate," and "real property," as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and inclosures for elec-

trical conductors and other appurtenances upon, above and under ground; all surface, under ground or elevated railroads, *including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways, or public places;* all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, *including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes;* all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the State. *A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a "special franchise." A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be*

*taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax.**

§ 2. Article two of the tax law is hereby amended, by adding at the end thereof sections forty-two, forty-three, forty-four, forty-five, forty-six, and forty-seven, and to read as follows:

§ 42. *Assessment of special franchise.* The state board of tax commissioners shall annually fix and determine the valuation of each special franchise subject to assessment in each city, town, village or tax district. Such board shall not less than ten nor more than thirty days next preceding the date when an annual assessment is required by law to be completed in any such city, town or village, file with the clerk of such city, town or village a written statement of the valuation of each special franchise in such city, town, village or tax district as fixed and determined by such board; and the valuation so fixed, shall be the assessed valuation on which all taxes based on such special franchises in such city, town or village for state, municipal, school or highway purposes, shall be levied during the next ensuing year. The assessors or other taxing officer, or other local officer in any city, town or village, or any state or county officer, shall on demand furnish to the state board of tax commissioners any information required by such board for the purpose of determining the value of a special franchise. Each city, town or village clerk shall within five days after the receipt by him of a statement of as-

*NOTE.—The portions of § 1 in italics and the whole of § 2 are new matter.

sessment of a special franchise by the state board of tax commissioners, deliver a copy of such statement certified by him to the assessors or other officers charged with the duty of making local assessments, in each tax district in such city, town or village. The valuation of a special franchise as so fixed by the state board of tax commissioners shall be entered by the assessors or other officers in the proper column of the assessment-roll.

§ 43. *Report to state board of tax commissioners.* Every person, co-partnership, association or corporation subject to taxation on a special franchise, shall, within thirty days after this section takes effect, or within thirty days after such special franchise is acquired, make a written report to the state board of tax commissioners containing a full description of every special franchise possessed or enjoyed by such person, co-partnership, association or corporation, a copy of the special law, grant, ordinance, or contract under which the same is held, or is possessed or enjoyed under a general law, a reference to such law, a statement of any condition, obligation or burden imposed upon such special franchise, or under which the same is enjoyed, together with any other information relating to the value of such special franchise, required by the state board. The state board of tax commissioners may from time to time require a farther or supplemental report from any such person, co-partnership, association or corporation, containing information and data upon such matters as it may specify. Every report required

by this section shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the association or corporation, or one of the persons or one of the members of the co-partnership making the same, to the effect that the statements contained therein are true. Such board may prepare blanks to be used in making the reports required by this section. Every person, co-partnership, association or corporation failing to make the report required by this section, or failing to make any special report required by the state board of tax commissioners within a reasonable time specified by it, shall forfeit to the people of the state the sum of one hundred dollars for every such failure and the additional sum of ten dollars for each day that such failure continues, and shall not be entitled to review the assessment by certiorari, as provided by section forty-five of this chapter.

§44. *Hearing on special franchise assessment.* On making an assessment of a special franchise, the state board of tax commissioners shall immediately give notice in writing to the person, copartnership, association or corporation affected, stating in substance that such assessment has been made, the total valuation of such special franchise, and the valuation thereof in each city, town, village or tax district; and that the board will meet at its office in the city of Albany on a day specified in such notice, which must not be less than twenty nor more than thirty days from the date of the notice, to hear and determine any complaint concerning such assessment. Such notice must be served at least ten days before the day fixed for the hearing; and it may be served

on a copartnership, association or corporation, by mailing a copy thereof to it at its principal office or place of business and on a person, either personally or by mailing it to him at his place of business or last known place of residence. Section thirty-six of this chapter applies so far as practicable to a hearing by the state board of tax commissioners under this section.

§45. *Certiorari to review assessment.* An assessment of a special franchise by the state board of tax commissioners may be reviewed in the manner prescribed by article eleven of this chapter, and that article applies so far as practicable to such an assessment, in the same manner and with the same force and effect as if the assessment had been made by local assessors; except that a petition for a writ of certiorari to review the assessment must be presented within fifteen days after notice of the filing of the statement of the valuation of a special franchise with the clerk of the city, town or village, as prescribed by section forty-two of this chapter. Such writ must run to and be answered by said state board of tax commissioners and no writ of certiorari to review any assessment of a special franchise shall run to any board or officer unless otherwise directed by the court of judge granting the writ. An adjudication made in the proceeding instituted by such writ of certiorari shall be binding upon the local assessors and any ministerial officer who performs any duty in the collection of said assessment in the same manner as though said local assessors or officers had been parties to the proceeding. The state board of tax commissioners on filing with the city, town or village clerk a statement

of the valuation of a special franchise, shall give to the person, copartnership, association or corporation affected written notice that such statement has been filed, and such notice may be served on a copartnership, association or corporation by mailing a copy thereof to it at its principal office or place of business, and on a person either personally or by mailing it to him at his place of business or last known place of residence.

§46. *Deduction from special franchise tax for local purposes.* If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town or village in which the tangible property is located, it shall appear that the person, copartnership, association or corporation affected has paid to such city, town or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, co-partnership, association, or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town or village except money paid or expended for paving or repairing of pavement of any street, highway or public place, shall be deducted from any tax based on the assessment made by the state board of tax commissioners for city, town or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for a city, town or village purposes. The chamberlain or treasurer of a city, the treasurer

of a village, the supervisor of a town, or other officer to whom any sum is paid for which a person, co-partnership, association, or corporation is entitled to credit as provided in this section, shall, not less than five nor more than twenty days before a tax on a special franchise is payable, make and deliver to the collector or receiver of taxes or other officer authorized to receive taxes for such city, town or village, his certificate showing the several amounts which have been paid during the year ending on the day of the date of the certificate. On the receipt of such certificate the collector, receiver or other officer shall immediately credit on the tax roll to the person, co-partnership, association or corporation on an assessment of a special franchise for city, town or village purposes only, but no credit shall be given on account of such payment or certificate in any other year, nor for a greater sum than the amount of the special franchise tax for city, town or village purposes, for the current year; and he shall collect and receive the balance, if any, of such tax as required by law.

§47. *Special franchise tax not to affect other tax.* The imposition or payment of a special franchise tax as provided in this chapter shall not relieve any association, copartnership or corporation from the payment of any organization tax or franchise tax or any other tax otherwise imposed by article nine of this chapter, or by any other provision of law; but tangible property subject to a special franchise tax situated in, upon, under or above any street, highway, public place or public waters, as described in subdivision three of section two shall not be taxable except upon

the assessment made as herein provided by the state board of tax commissioners.

§3. Sections twenty-one and thirty-one of the tax law are hereby amended to read as follows:

§21. *Preparation of assessment roll.* They shall prepare an assessment roll containing six separate columns and shall, according to the best information in their power, set down:

1. In the first column the names of all the taxable persons in the tax district.

2. In the second column the quantity of real property taxable to each person with a statement thereof in such form as the commissioners of taxes shall prescribe.

3. In the third column the full value of such real property.

4. In the fourth column the full value of all the taxable personal property owned by each person respectively after deducting the just debts owing by him.

5. In the fifth column the value of taxable rents reserved and chargeable upon lands within the tax district, estimated at a principal sum, the interest of which, at the legal rate per annum, shall produce a sum equal to such annual rents and if payable in any other thing except money the value of the rents in money to be ascertained by them and the value of each rent assessed separately, and if the name of the person entitled to receive the rent assessed cannot be ascertained by the assessors, it shall be assessed against the tenant in possesion of the real property upon which the rents are chargeable.

5. *In the fifth column the value of any special franchise owned by it as fixed by the State board of tax commissioners.**

Sec. 4. Subdivision six of section one hundred and seventy-one of the tax law is hereby amended to read as follows:

6. Employ a clerk, prescribe his duties and fix his salary at a sum not exceeding two thousand dollars, and also other needed assistants, prescribe their duties and fix their compensation which shall not exceed in the aggregate the amount annually appropriated by the legislature for that purpose.

§ 5. Section thirty-seven of the tax law is hereby amended to read as follows:

§ 37. When the assessors or a majority of them shall have completed their roll, they shall severally appear before any officer of their county authorized by law to administer oaths and shall severally make and subscribe before such officer an oath in the following form: "We, the undersigned, do severally depose and swear that we have set down in the foregoing assessment roll all the real estate situated in the tax district in which we are assessors, according to our best information; and that, with the exception of those cases in which the value of the said real estate has been changed by reason of proof produced before us, *and with the exception of those cases in which the value of any special franchise has been fixed by the State board of tax commissioners,** we have estimated the value of the said real

*Note.—The poportion in itatics is new matter.

6. *In the sixth solumn the value of the special franchise as fixed by the state board of tax commissioners**

§31. *Corporations how assessed.* The assessors shall assess corporations liable to taxation in their respective tax districts upon their assessment rolls in the following manner:

1. In the first column the name of each corporation, and under its name the amount of its capital stock paid in and secured to be paid in; the amount paid by it for real property then owned by it wherever situated; the amount of all surplus profits or reserve funds exceeding ten per centum of their capital, after deducting therefrom the amount of said real property and the amount of its stock, if any, belonging to the state and to incorporated literary and charitable institutions.

2. In the second column the quantity of real property, *except special franchises owned by such corporation* and situated within their tax district.

3. In the third column the actual value of such real property, *except special franchises.*

4. In the fourth column the amount of the capital stock paid in and secured to be paid in, and of all such surplus profits or reserve funds as aforesaid, after deducting the sums paid out for all the real estate of the company, wherever the same may be situated, and then belonging to it, and the amount of stock, if any, belonging to the people of the State and to incorporated literary and charitable institutions.

*Note.—The portion in italics is new matter.

estate at the sums which a majority of the assessors have decided to be the full value thereof; and also, that the said assessment roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll over and above the amount of debts due from such persons, respectively, and excluding such stocks as are otherwise taxable, and such other property as is exempt by law from taxation, at the full value thereof, according to our best judgment and belief," which oath shall be written or printed on said roll, signed by the assessors and certified by the officer.

§ 6. This act shall take effect on the first day of October, eighteen hundred and ninety-nine.